Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

GRIFFIN TELEVISION OKC, L.L.C.,
and CHRIS HALSNE,

Petitioners,

v.

H. L. MITCHELL, D.V.M.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in a defamation and false light invasion of privacy action instituted by a private figure against a television broadcaster, in which the jury bases its entire verdict on a finding of actual malice, the First and Fourteenth Amendments obligate a state appellate court to conduct an independent review of all the evidence presented to the jury about the statements in issue and the circumstances under which they were made, rather than using a deferential standard that disregards all evidence favorable to the defendant broadcaster.

2. Whether, in a defamation and false light invasion of privacy case, the First and Fourteenth Amendments, as interpreted by *Time, Inc. v. Pape*, 401 U.S. 279 (1971), permit a finding of actual malice solely on the basis that the appellate court's interpretation of an ambiguous public document differs from the rational interpretation given the document by the broadcaster, where the broadcaster accurately presents the interpretation of that document given to it by the official spokesperson for the issuing public agency.

3. Whether the judgment based on a finding of actual malice in a defamation and false light invasion of privacy action brought by a private figure is consistent with the First and Fourteenth Amendments, where all the evidence presented at trial, when reviewed independently, demonstrates that defamatory statements in the petitioners' broadcasts were supported by credible, including public official, sources.

STATEMENT PURSUANT TO RULE 29.6

Griffin Television OKC, L.L.C., formerly known as Griffin Television, L.L.C., is wholly-owned by Griffin Communications, L.L.C.

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Petitioners, Griffin Television OKC, L.L.C., and Chris Halsne, respectfully pray that a writ of certiorari issue to review the opinion and decision of the Oklahoma Court of Civil Appeals (Division III) issued on September 6, 2002, as to which the Supreme Court of Oklahoma denied discretionary certiorari review on November 25, 2002.

OPINION BELOW

The opinion of the Oklahoma Court of Civil Appeals is reported at 2002 OK CIV APP 115,* __ P.3d __. That opinion, and the unpublished order of the Oklahoma Supreme Court denying certiorari review, are included in the Appendix ("App.") hereto.

STATEMENT OF JURISDICTION

The opinion of the Oklahoma Court of Civil Appeals was entered on September 6, 2002. Timely petitions for certiorari were filed in the Oklahoma Supreme Court on September 26, 2002 by both Petitioners and Respondent. Those petitions were denied by order of the Oklahoma Supreme Court on November 25, 2002. Jurisdiction is invoked under 28 U.S.C. § 1257, as interpreted by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-86 (1975).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Fourteenth Amendment, Section 1, United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

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* Opinions of the Oklahoma appellate courts are available at http//:www.oscn.net.

STATEMENT OF THE CASE

A. Preliminary Statement

On June 27, 2001, a jury awarded $6 million in presumed damages in a defamation and false light invasion of privacy action instituted by Respondent H. L. Mitchell, D.V.M. ("Mitchell"), in Creek County, Oklahoma, against Griffin Television, L.L.C. ("KWTV"), the then owner and licensee of television station KWTV, Channel 9 in Oklahoma City, and Chris Halsne ("Halsne"), a reporter for KWTV. The jury also awarded punitive damages of $250,000 against KWTV and $250,000 against Halsne.[1] The action was based on a series of investigative reports prepared by Halsne and broadcast by KWTV from time to time between January 26 and September 13, 1998.

The parties agreed that Mitchell was a "private figure" within the meaning of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Under prevailing Oklahoma law, he was required to prove professional negligence to establish petitioners' liability on his defamation claim, *Martin v. Griffin Television, Inc.*, 1976 OK 13, 549 P.2d 85, but under *Colbert v. World Pub. Co.*, 1987 OK 116, 747 P.2d 286, liability for his false light claim required proof of "actual malice" as that term was defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). At trial, Mitchell effectively abandoned his effort to prove negligence and argued to the jury that petitioners' alleged failure to investigate adequately the facts reported about him constituted actual malice.[2] The jury agreed, finding in response to a question posed as part of a general jury verdict form that both KWTV and Halsne acted with actual malice. The Oklahoma Court of Civil Appeals

1. The final judgment entered by the trial court on August 21, 2001, which added pre-judgment interest allowed by Oklahoma law and costs, totaled $7,828,960.02 (App. at 26a).

2. The district court overruled the defendants' demurrer at the close of the plaintiff's evidence (Tr. 1184-1215) and their motion for directed verdict at the close of all the evidence (Tr. 1523-24), in which they argued that no reasonable jury could find actual malice by clear and convincing evidence.

affirmed the finding of actual malice, the judgment of liability, and the award of punitive damages.[3] In doing so, the appellate court ignored the independent-review requirements of *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), expressly choosing instead to use a deferential standard of review under which it looked only at the evidence favorable to Mitchell, drew all inferences in his favor, and "reject[ed] all evidence adduced by the adverse party which conflicts with the [jury verdict]." App. at 5a-6a.

The Oklahoma Supreme Court denied certiorari, leaving the for-publication decision of the Oklahoma Court of Civil Appeals to stand as authority in First Amendment cases in Oklahoma that is clearly and openly contrary to decisions from this Court. The decision marks the first time since *Bose* that an Oklahoma appellate court has said it has no duty to conduct an independent review of the whole record, and it represents an alarming shift in the Oklahoma appellate courts to an easier, but unconstitutional, standard of review. Certiorari should be granted in this case because, if left undisturbed, the Oklahoma Court of Appeals' decision would signal the unconstitutional departure of Oklahoma appellate courts from the duty of independent review so necessary to preserve the First Amendment rights of the media.

Moreover, the evidence presented at trial, when reviewed independently, shows that petitioners had credible sources for all statements Mitchell claimed to be false and defamatory, including the supporting statements of the official spokesperson

3. The Court of Civil Appeals reversed the award of $6 million presumed damages on the ground that under state law, Okla. Stat. tit. 12, § 1447.3, a plaintiff may not recover presumed damages but only those damages as "he has alleged and proved." The case was remanded to the district court for a new trial with respect to the actual damages, if any, suffered by the plaintiff, Respondent here. The punitive damages award was affirmed on the condition that the plaintiff, on retrial, recover some actual damages. The reversal of the presumed damages award does not affect this Court's jurisdiction under 28 U.S.C. § 1257 for the reasons explained at pp. 17-20, *infra*.

for a public agency whose ambiguous document formed the primary basis for Mitchell's claim of falsity. The finding of liability based on actual malice upheld by the Oklahoma appellate courts is wholly inconsistent with the teachings of *New York Times*. The Court of Civil Appeals' decision resurrects the concept rejected in *Time, Inc. v. Pape*, 401 U.S. 279 (1971), and other cases from this Court, that a publisher's rational interpretation of an ambiguous public document can by itself support a finding of actual malice if a jury later disagrees with the interpretation.

This case affords the Court the opportunity "through the course of case-by-case adjudication [to] give content to these elusive constitutional standards," *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989),[4] of independent appellate review and the meaning of "actual malice." The decision of the Oklahoma appellate court, if unchanged, will have a decidedly "chilling effect" on the rights of the media reporting on public proceedings. Under the opinion, any publisher or broadcaster covering the activities of a public agency who accurately reported information obtained from an official spokesperson for the agency and documents in the agency's files would nevertheless risk being found guilty of "reckless disregard of the truth" if the agency's files contained other documents at odds with the spokesperson's interpretation.

B. Statement of Facts

Mitchell complained about numerous statements in several television news reports broadcast over a nine-month period. The facts reported about Mitchell were extensively investigated, and are summarized here.

1. District Court proceedings

Prior to trial, the court found certain facts to be uncontroverted. Those findings and the evidence at trial showed the following:

4. *See also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984) ("When the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance.").

Mitchell is a veterinarian who specializes in holistic veterinarian therapies, which are considered unconventional and are not widely accepted or recognized in the industry. Mitchell's holistic therapies include electric acupuncture, magnetic blanket treatment, and laser therapy, and he was reported to employ such unusual techniques as implanting gold beads and injecting super glue.

(a) Mitchell and Doo Dominate

In 1994, Mitchell obtained an owner's license with the New Mexico Horse Racing Commission ("NMHRC") which entitled him to race horses in New Mexico but not to provide any veterinary services at the tracks. Nevertheless, Mitchell illegally practiced veterinary medicine at the Ruidoso Downs race track in 1994. In July of that year, the track Board of Stewards cautioned Mitchell against practicing veterinary medicine without a license. Mitchell said that he would not do so; but despite his statement to the stewards, Mitchell treated his own and other horses, including one of the country's top race horses, Doo Dominate.

After the 1994 All American Futurity time trials and before the actual race, Doo Dominate was "three-legged lame," or carrying one leg and walking on three. A track veterinarian x-rayed the horse's leg and diagnosed him as having a slab fracture in the left knee. He advised Doo Dominate's trainer and owner that the injury was too severe to run the horse and that he would likely break down if he ran in the finals. Another veterinarian also examined Doo Dominate before the All American Futurity for a person who was interested in buying the horse. X-rays showed that the knee was fractured; the vet recommended against the purchase.

Doo Dominate's owner and trainer were looking for some way to get the horse ready to race in the All American Futurity, so the trainer asked Mitchell to work on the horse. Mitchell did so. When Mitchell first looked at the horse, he too thought the horse was unfit to run; but he understood that his job was to get the horse ready to race. Mitchell knew the track veterinarian

believed the knee was fractured, but he was unable to find any chip or fracture and concluded that the knee was infected, not broken. Mitchell treated Doo Dominate from August 31 through September 3, 1994, using acupuncture and magnetic blanket therapy as well as antibiotics. By September 4, the day before the race, Mitchell concluded the horse was sound. He did not report to the stewards that the horse had any problem that might keep it from racing. Mitchell was the last vet to give Doo Dominate treatment for injury before the race.

On September 5, 1994, Doo Dominate ran in the All American Futurity and stumbled approximately 100 yards from the finish line, breaking both legs. After Doo Dominate fell, track veterinarians took blood and urine samples from the horse and destroyed him. The urine sample taken from Doo Dominate revealed the presence of mepivicaine, an illegal pain-killer.[5] The State Chemist concluded that the horse ran doped up.

To determine what caused Doo Dominate to stumble, track veterinarians also conducted a necropsy on Doo Dominate. A veterinarian with the New Mexico Department of Agriculture reported that the horse had a knee fracture "severe enough to make this horse unfit for racing." Another veterinarian with Colorado State University analyzed the x-rays of Doo Dominate's legs. He concluded that "the injury was too severe to contemplate running the horse" and that there was a "great likelihood the horse could break down" if it was allowed to run.

(b) The NMHRC investigation

The NMHRC conducted an extensive investigation into the breakdown of Doo Dominate, directed by Wayne Conwell, the Medication Manager and Lead Investigator for the NMHRC. Conwell interviewed many witnesses himself, including Mitchell, and extensively investigated Mitchell's treatment of Doo Dominate. Based on his investigation, Conwell believed

5. Under NMHRC rules in effect at the time, a horse was considered to have run doped up if post-race testing showed the presence of a prohibited drug, regardless whether the drug affected the horse's performance.

Mitchell helped kill Doo Dominate by failing to diagnose the slab fracture, wrongly concluding that the horse was sound, and failing to take action to scratch the horse from the race.

On January 13, 1995, the NMHRC issued Notices of Contemplated Commission Action against Mitchell, as well as Doo Dominate's owner and trainer. The Notice of Action charged Mitchell with, among other things, assisting Doo Dominate's owner and trainer to race the horse when it was unfit; practicing veterinary medicine without a license; and misrepresentation to the Board of Stewards.[6]

Mitchell offered to relinquish his New Mexico owner's license voluntarily without admission of wrongdoing, but the NMHRC refused the offer and proceeded with a hearing. The NMHRC approved the hearing officers' report in a Decision and Order. The Decision and Order against Mitchell concluded that he had practiced veterinary medicine illegally and permanently revoked his owner's license. Mitchell was banned for life from New Mexico racetracks.

Both industry and mainstream media reported that Doo Dominate ran in the All American Futurity with a fractured knee, that Mitchell treated the horse in the days before the race, and that the horse tested positive for mepivacaine.

(c) Mitchell and This Lady Sings

In November 1997, Mitchell performed veterinarian services at the American Quarter Horse Association ("AQHA") World Championships held in Oklahoma City. Three days prior to her performance in the 1997 World Championships, Mitchell treated a quarter horse named This Lady Sings, owned by T.J. Offutt, at the request of trainer Ronnie Casper. In Mitchell's opinion, This Lady Sings was very badly shod and, at the time, partly lame on her right front foot.

Mitchell performed a Sarapin "block" on the right front foot of This Lady Sings late in the evening on November 11,

6. The same day, a NMHRC press release said that charges would be brought against Mitchell, the owner, and the trainer because "Investigative reports indicate that the horse 'Doo Dominate' may not have been in sound condition to run in the All American Futurity."

1997. Sarapin is a non-detectable painkiller; its length of effectiveness can vary widely and could affect a horse's performance.[7] On November 13, 1997, Casper privately showed This Lady Sings to Ron Skoda and Skoda's trainer, Jeff Alexander, at which time the mare appeared sound. The next day, This Lady Sings competed in the World Championships and won the Amateur Two Year Old Division.

After the amateur competition, Skoda offered to purchase This Lady Sings for $100,000. On November 15, 1997, at the request of Alexander, Mitchell examined This Lady Sings and told Alexander that the horse was sound. Mitchell did not inform Alexander that he had treated This Lady Sings before the horse won the World Championship amateur title, or that he had given This Lady Sings a Sarapin block.

Skoda purchased This Lady Sings from Offutt for $100,000. When Alexander took possession of the mare on November 21, 1997, This Lady Sings exhibited unsoundness. Mitchell again examined the horse and concluded it had pellestitis. A few days later, at Skoda's request, another veterinarian conducted a post-purchase/lameness exam of This Lady Sings, concluding that the horse was slightly lame and suffering from chronic foot problems.

On January 21, 1998, Skoda filed a federal civil lawsuit against Offutt for breach of warranty, rescission, and fraud in the inducement. In the complaint, Skoda alleged that Mitchell had "blocked" This Lady Sings prior to the World Championship so that the horse would not present an outward manifestation of pain or unsound gate;[8] Offutt and his trainer, Casper, knew that This Lady Sings was lame prior to the World Championship and the horse was treated to disguise its lame condition; Mitchell conducted a prepurchase examination of This Lady Sings and

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7. Mitchell's son, who is also a veterinarian, testified that the effects of Sarapin can last "a few hours to a few weeks and basically what that's saying is nobody really knows what the range of Sarapin is."

8. AQHA Rule 441, as written and enforced in November 1997, said that "no foreign substance or drug which is of such character as could affect a horse's performance is acceptable."

represented to Skoda that the horse was sound, when in fact it was not; and after This Lady Sings exhibited lameness, Mitchell again treated the horse, but it remained lame.

(d) Mitchell and the Oklahoma Horse Racing Commission

In early 1998, the Board of Stewards of the Oklahoma Horse Racing Commission ("OHRC") filed a complaint against Mitchell for failing to disclose on his 1998 owner's license application that his 1994 occupational license had been revoked by the NMHRC. On March 12, 1998, Mitchell entered a plea of no-contest to a violation of an OHRC rule. The Board of Stewards accepted Mitchell's plea of no-contest, imposed a $300 fine, and accepted Mitchell's surrender of his owners license.

(e) Mitchell and the Oklahoma Board of Veterinary Medical Examiners

On April 30, 1998, the Oklahoma Board of Veterinary Medical Examiners filed a complaint against Mitchell for failing to disclose that his occupational license had been revoked by the NMHRC; administering "a posterior digital block on the lower right leg of This Lady Sings . . [which] disguised the mare's condition of lameness;" failing to disclose to Alexander that he had administered a digital block on This Lady Sings; and being the subject of action by the Board of Stewards of the OHRC. The complaint accused Mitchell of fraud or misrepresentation in applying for a license; conduct likely to deceive, defraud, or harm the public; negligence; and conflict of interest.

On October 20, 1998, the Veterinary Board found that Mitchell had practiced in New Mexico without proper licensing, that the NMHRC had permanently revoked his owner's license, that Mitchell failed to disclose this information on his 1996 and 1997 veterinary medical license renewal applications, and that Mitchell had been the subject of a formal complaint by the Board of Stewards of the OHRC. The Veterinary Board concluded that Mitchell engaged in fraud or misrepresentation in applying for renewal of his veterinary license and it placed Mitchell on probation for two years.

(f) KWTV's investigation and broadcast reports

In 1998, KWTV broadcast a series of news reports about the plaintiff. The reports aired on the following dates: January 26, January 27, February 5, March 26, June 15, June 17, September 12, and September 13.[9]

KWTV's investigation leading to the two initial reports in January began with a tip to Halsne, its investigative reporter, that there was a dispute over the possible doping and alleged fraud in the sale of a top show horse. Halsne determined that the horse involved was This Lady Sings. He interviewed several key participants in the dispute, including Alexander, Skoda's attorney, AQHA representatives, and veterinarians (who talked about the increasing use of Sarapin in the show circuit and gave their opinions about how long Sarapin could affect a horse's performance). Offutt would not comment. Halsne obtained documentary information about Sarapin and reviewed the complaint and other public documents in the *Skoda v. Offutt* lawsuit. He also conducted an on-camera interview of Mitchell, who admitted giving Sarapin to This Lady Sings.

Halsne's investigation into the dispute over This Lady Sings was consistent with what reasonable journalists would do under similar circumstances. Even the plaintiff's expert witness found no fault with the investigation. Halsne believed the information he reported to be true.

The broadcast of the two reports in January 1998 resulted in another tip to Halsne that Mitchell had earlier been in trouble in New Mexico for his veterinary practices. When Halsne inquired, he found out that Mitchell had been banned from race tracks in New Mexico for practicing veterinary medicine there illegally. In the course of his investigation, Halsne spoke several times by phone with Wayne Conwell, the lead investigator for the NMHRC. Halsne and a photographer went to Albuquerque, New Mexico, interviewed Conwell on camera,[10] and reviewed

9. A transcript of the various news reports is reproduced at App. 35a-61a.

10. The interview was attended by Julian Luna, the Executive Director of the NMHRC, but Conwell was presented as the official spokesperson for the agency.

documents from the New Mexico investigation. Halsne and his photographer looked at many, though not all, of the documents supplied to them, focusing on those documents identified by Conwell or the NMHRC staff that bore out the information conveyed to Halsne by Conwell.

Halsne relied on the information supplied by Conwell as the official spokesperson for the NMHRC. Conwell told Halsne that Mitchell had illegally worked on Doo Dominate, and that the horse ran doped up and with a broken leg. Halsne reviewed, photographed, and copied documents which supported those statements. Halsne nevertheless closely questioned Conwell on issues of significance. For example, Conwell and Halsne discussed the basis on which Conwell concluded that Doo Dominate ran doped up,[11] and the basis on which Conwell believed that Mitchell was the most likely suspect in doping the horse.[12]

Conwell explained to Halsne that Mitchell tried to surrender his owner's license, but New Mexico officials refused. Mitchell

11. The plaintiff was permitted to introduce evidence that the first test for drugs by the lab used by the NMHRC was negative for drugs, and that an independent test of a split sample of Doo Dominate's urine was negative for mepivicaine. He was also permitted to introduce evidence that drug charges against two others involved were dropped. However, Conwell testified that the first test was "negative" for drugs because the state lab did not initially test for blocking agents such as mepivicaine, and when the lab was instructed to test for those agents, the test was positive. Conwell did not find the "negative" result from the independent lab persuasive for a number of reasons, which he explained to Halsne. Neither did the State Chemist, who also concluded that the horse ran doped up. Conwell testified that the charges against the two others were dropped for reasons other than the horse was not doped up. Conwell explained these things to Halsne's satisfaction before the broadcasts.

12. Halsne testified that after investigating Mitchell's involvement in giving This Lady Sings a non-detectable pain killer, and based on calls from viewers after the January 1998 reports suggesting that they knew of other occasions in which Mitchell had engaged in doping horses, he found Conwell's suspicion that Mitchell was involved in doping Doo Dominate believable.

did not appear at his hearing. Conwell said the most serious sanction that Mitchell could receive was revocation of his license, so the state did not present all the evidence it had developed in the investigation. Instead, it presented the evidence relating to Mitchell's illegal practice of veterinary medicine, which was itself sufficient to revoke Mitchell's owner's license.[13] Nevertheless, Conwell told Halsne he believed, based on his investigation, that Mitchell was probably the person who doped Doo Dominate and that Mitchell's actions and inactions had helped lead to the death of the horse. As a result, according to Conwell, Mitchell received the most severe sanction ever imposed on a veterinarian for illegal practice in that state.

At trial, Conwell testified that KWTV's reports about Mitchell's role in the events in New Mexico were accurate and accurately reflected what Conwell, as the official spokesperson for the NMHRC, told Halsne.

(g) Mitchell's claims

Mitchell initially claimed that thirty-three statements in the various broadcasts were false and defamatory to him or placed him in a false light. By the time of trial, the number of statements at issue had been reduced to fifteen. The court ultimately submitted twelve statements to the jury. App. at 62a-65a.

KWTV and Halsne had credible sources, including public documents, to support each and every statement in the news reports. Halsne and the other KWTV personnel involved in investigating and preparing the news reports about Mitchell all testified that they believed the reports to be true when they were broadcast and they believe them to be true now. Joyce Reed, at the time KWTV's news director who had ultimate responsibility

13. Conwell gave this explanation in response to questions by Halsne about the language of the Decision and Order which said that "[t]he evidence presented at the hearing was insufficient to prove . . . that Mitchell had assisted [the owner and trainer] to race the horse 'Doo Dominate' when it was in no condition to run." According to Conwell, the "evidence *presented at the hearing* was insufficient" because the state elected not to present any evidence. Conwell believed there was ample evidence that Mitchell had helped kill Doo Dominate.

for the decision to broadcast, believed the reports about Mitchell were true.

Mitchell's contention with respect to the statements in the February report about Doo Dominate, and the March, June, and September 1998 reports about disciplinary charges and proceedings against him in Oklahoma (which made a reference in some fashion to Mitchell's problems in New Mexico) was that Halsne was "reckless" because he did not look at all of the documents in the New Mexico file. In essence, Mitchell's trial theme was that Halsne should have fully re-investigated what Conwell had already investigated, rather than rely on the opinions and conclusions of the official spokesman for the NHRC. This theme of what is "reckless" – *i.e.*, not doing what Mitchell contended a reasonable person would do – pervaded the entire trial, from voir dire and opening statement through closing argument (*see, e.g.*, Tr. at 52-56, 124-26, 133-34, 139-40, 1567-72, 1574-75, 1605-06, 1609).

The plaintiff presented no competent evidence that his reputation was harmed by a false and defamatory statement about him, relying instead on a presumption of damage.

2. The verdict

The first phase of bifurcated trial ended with a verdict of liability in favor of Mitchell on both his defamation and false light claims, and an award of $6 million in presumed damages. The verdict form, reproduced at App. 31a-32a, asked the jury to make a single finding with respect to KWTV and Halsne: "We do __ do not __ (Check One) find by clear and convincing evidence that [name of defendant] acted in reckless disregard of the truth of the statements published." The jury checked the first box ("we do") for both KWTV and Halsne.

The second stage of the trial concluded with a jury award to Mitchell of $500,000 in punitive damages, split evenly between KWTV and Halsne. App. at 29a.

The court subsequently entered judgment on the jury verdict, App. at 25a-26a, after the parties submitted their respective calculations of prejudgment interest and costs for

which Mitchell could recover under state law. The judgment was for a total of $7,828,960.02.

3. The decision below

On September 6, 2002, Division III of the Oklahoma Court of Civil Appeals affirmed the finding of actual malice, the judgment of liability for both defamation and false light invasion of privacy, and the award of punitive damages. The court reversed the award of $6 million in presumed damages. Despite having been apprised of the standard required by this Court,[14] the court explicitly stated that it had reviewed the judgment under the following standard (App. at 5a-6a):

> In reviewing a judgment based on a jury verdict, we may not disturb the jury's verdict where there is any competent evidence reasonably tending to support it. The jury is the exclusive arbiter of the credibility of witnesses, and its verdict is conclusive as to all disputed facts and all conflicting statements. We must determine the sufficiency of the evidence to sustain a judgment in light of the evidence tending to support it, together with every reasonable inference deducible therefore, rejecting all evidence adduced by the adverse party which conflicts with it. *Florofax Intern., Inc. v. GTE Market Resources, Inc.*, 1997 OK 7, 933 P.2d 282, 287.

The Court of Civil Appeals' review of the evidence was indeed deferential. With respect to the reports about This Lady Sings, the court construed the broadcast statements to be unsupported by the specific allegations in the federal court complaint. The court therefore concluded that, because Halsne admitted he was familiar with the complaint, the variance the court perceived between the language of the complaint and the

14. KWTV and Halsne argued in their appellate briefs that *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), and other cases required that the Court of Civil Appeals conduct an independent review of the evidence regarding actual malice (App. at 66a-67a, 69a). The Court of Civil Appeals did not discuss *Bose* or the other cases in its opinion.

language of the news reports about This Lady Sings was alone sufficient to support a finding by clear and convincing evidence that the statements were made with actual malice (App. at 9a-10a). The court made no mention of the evidence that *Halsne did not perceive a variance* between the complaint and what he reported, nor did it discuss the evidence that Halsne had sources for what he reported (including conversations with a representative of the plaintiff and with the lawyer who drafted and filed the complaint).

Likewise, with respect to the report about Doo Dominate, the court construed the statements broadcast in February and March 1998 that the horse ran doped up and that Mitchell was linked to the doping to be inconsistent with the NMHRC Decision and Order, which, according to the appellate court, "specifically concluded the evidence was insufficient to prove Mitchell assisted the owner and trainer in running an unfit horse" (App. at 11a). The court did not discuss the information Halsne received from the official spokesperson for the NMHRC, Conwell, who had conducted the investigation, nor did it discuss the fact that Conwell had explained to Halsne's satisfaction the apparent discrepancy between the language of the Decision and Order and the views expressed by Conwell. Instead, the court leaped from its own interpretation of the Decision and Order (which was inconsistent with the interpretation given to it by Conwell) to the conclusion that KWTV's reports were false, and then said merely that "there is evidence" (App. at 14a) that Halsne knew his statements were false or recklessly disregarded their falsity because before the broadcasts, Halsne reviewed the Decision and Order and knew drug charges against the owner and trainer had been dismissed.

The court ignored Conwell's trial testimony that KWTV's reports about Mitchell's role in the events in New Mexico were accurate and accurately reflected what Conwell, as the official spokesperson for the NMHRC, told Halsne.[15]

15. KWTV and Halsne, relying on cases such as *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), *Bose*, *supra* n.14, and *Time*, (Cont'd)

The reversal of the presumed damages award was based exclusively on a state-law ground, that Okla. Stat. tit. 12, § 1447.3 did not permit presumed damages against a television or radio broadcaster. The Court of Civil Appeals remanded the case to the District Court of Creek County to conduct a retrial of the issue of actual damages, and it conditioned the affirmance of the punitive damages award on Mitchell's success in obtaining a judgment for actual damages on retrial. The Court of Civil Appeals designated its opinion for publication.

Both Mitchell and KWTV and Halsne filed petitions for certiorari with the Oklahoma Supreme Court. Mitchell contended primarily that § 1447.3 had no application to this case and did not foreclose presumed damages; KWTV and Halsne contended primarily that the Court of Civil Appeals had failed to conduct an independent review of the evidence as constitutionally required and that the evidence was insufficient to support a finding of actual malice, thus negating the entire verdict in favor of Mitchell.[16] Mitchell asked the Oklahoma Supreme Court to affirm the district court judgment; KWTV and Halsne asked the court to enter judgment for them.

On November 25, 2002, the Oklahoma Supreme Court, three Justices dissenting, denied both certiorari petitions

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Inc. v. Pape, 466 U.S. 485 (1971), argued in their appellate briefs that actual malice could not be inferred because the publisher's rational interpretation of an ambiguous public document or its presentation of ambiguous events differed from that favored by the plaintiff (App. at 69a-70a). The Court of Civil Appeals not only ignored the citations, it concluded the opposite.

16. In their certiorari papers before the Oklahoma Supreme Court, KWTV and Halsne again invoked the requirement of independent appellate review (App. at 71a-73a); argued that the evidence, properly reviewed, could not sustain a finding of actual malice (App. at 72a-76a); and urged the Oklahoma Supreme Court to see that the analysis used by the Court of Civil Appeals to affirm the judgment of liability—inferring falsity and actual malice from the difference between its interpretation of the facts and that offered in the broadcasts—was constitutionally flawed (App. at 75a-76a).

(App. at 30a). The mandate issued on December 19, 2002. On January 13, 2003, the Oklahoma Supreme Court granted the motion of KWTV and Halsne pursuant to Okla. S. Ct. Rule 1.16 to suspend the effectiveness of the mandate pending this Court's disposition of this certiorari petition.

REASONS FOR GRANTING THE PETITION

This case squarely presents the important federal questions whether, even in cases brought by private figures, the duty of independent review applies to findings of actual malice; and whether discrepancies perceived by a jury (or an appellate court) between the literal language of documents in a public file and the accurately-reported interpretation given to those documents by the official spokesperson for the public agency can support a finding of actual malice against a publisher or broadcaster. Although the opinion of the Court of Civil Appeals reversed the jury award of presumed damages and remanded the case to the district court for retrial on the amount, if any, of actual damages, the federal issues raised by this petition were finally decided by the Oklahoma appellate courts and are not subject to further review there. This Court has jurisdiction to grant certiorari under the fourth category of cases recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-86 (1975), as satisfying the finality requirement of 28 U.S.C. § 1257.

I. This Court Has Jurisdiction To Review a State Court Decision Which Has Finally Decided the Federal Issue.

Under 28 U.S.C. § 1257(a), this Court has certiorari jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." Petitioners recognize, of course, that the decision of the Oklahoma Court of Civil Appeals is not "final" with respect to all state-law issues, because the appellate court reversed, on a state-law ground, the jury verdict of presumed damages, remanding that aspect of the case to the district court for retrial.

However, § 1257(a) "finality" is determined with a "pragmatic approach." *Cox Broadcasting*, 420 U.S. at 486. As this Court has frequently recognized, most recently in *Pierce County, Washington v. Guillen*, 537 U.S. ___ (2003), "certain state-court judgments can be treated as final for jurisdictional purposes, even though further proceedings are to take place in the state courts. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-483 (1975) (outlining four exceptions to the finality rule)." *Guillen* at ___. The fourth category of cases recognizes finality within the meaning of § 1257(a) where

> the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action.

Cox Broadcasting, 420 U.S. at 482-483. The fourth category discussed in *Cox Broadcasting* applies here.

In the present case, if Petitioners were to prevail on retrial of the actual damages issue remanded by the Oklahoma Court of Civil Appeals,[17] the punitive damages award would also fall. Under those circumstances, Petitioners would have effectively prevailed on the state-law issue of damages and would have no basis to appeal the judgment. This Court would have no opportunity to review the erroneous finding of "actual malice,"[18]

17. In the original trial, Respondent produced no evidence that he personally suffered actual harm to his reputation as a result of a false and defamatory statement about him in KWTV's broadcasts. As a result, he elected to try his case on an "actual malice" theory, believing that success on that theory would entitle him to presumed damages not constitutionally forbidden by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

18. Nor would the Oklahoma appellate courts, for whom the decision of the Court of Civil Appeals stands as the settled law of the

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and the Court of Civil Appeals' for-publication decision approving a deferential standard of review in actual malice cases involving matters of public concern against the media, and concluding that particular evidence favorable to the plaintiff (without reference to any conflicting evidence) was sufficient to support a finding of actual malice, would remain, unchallenged, as authority to be followed by Oklahoma courts.

On the other hand, were this Court to conclude that, under the appropriate standard of independent review, the evidence presented at trial did not clearly and convincingly demonstrate actual malice, the reversal of the decision of the Court of Civil Appeals would preclude further litigation.

The applicability of the fourth *Cox Broadcasting* category to this case is apparent from the text at pages 485-486 of that case. Substituting the facts of this case, that text reads as follows:

> The [Oklahoma Court of Civil Appeals'] judgment is plainly final on the federal issue and is not subject to further review in the state courts. Appellants will be liable for damages if [the plaintiff proves actual harm to reputation]. They may prevail at trial on nonfederal grounds, it is true, but if the [Oklahoma] court erroneously upheld [the finding of actual malice], there should be no trial at all [because on his defamation claim, Mitchell would not have been entitled to either presumed or punitive damages, and under *Gertz* his failure to prove actual harm would have resulted in a defendants' verdict; and his false light claim would have failed as well for lack of an essential element]. Moreover, even if appellants prevailed at trial and made unnecessary further consideration of the

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case. *See, e.g., Patel v. OMH Medical Center*, 1999 OK 33, ¶ 22, 987 P.2d 1185, 1195 ("Settled-law-of-the-case doctrine operates to bar relitigation of issues in a case that are finally settled by an appellate opinion . . . Settled-law-of-the-case doctrine is a rule of judicial economy designed to prevent an appellate court from twice having to deal with the same issue.").

> constitutional question, there would remain in effect the unreviewed decision of the [Oklahoma Court of Civil Appeals] that [an appellate court need not conduct an independent review of the evidence of actual malice] despite the First and Fourteenth Amendments. Delaying final decision of the First Amendment claim [that actual malice cannot be inferred solely from the claimed disparity between a broadcast report and the language of a public document, where the interpretation in the broadcast is supported by the testimony of the official spokesperson for the agency issuing the document] until after trial will "leave unanswered . . . an important question of freedom of the press under the First Amendment," "an uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press." [*Miami Herald Publishing Co. v.*] *Tornillo*, [418 U.S. 241 (1974)] at 247. On the other hand, if we now hold that the First and Fourteenth Amendments bar civil liability [based on actual malice] for broadcasting [a rational interpretation of a public document supported by the issuing agency's spokesperson], this litigation ends. Given these factors—that the litigation could be terminated by our decision on the merits and that a failure to decide the question now will leave the press in [Oklahoma and the other states] operating in the shadow of a rule of law . . . the constitutionality of which is in serious doubt—we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality.

This Court has jurisdiction under § 1257(a) given its pragmatic approach to finality.

II. The Court of Civil Appeals' Opinion Conflicts with Decisions from This Court Regarding the Standard of Review.

This Court held in *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), that an appellate court must "make an independent examination of the whole record" to ensure that a judgment rendered in favor of a public official "does not constitute a forbidden intrusion on the field of free expression." Twenty years later, in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), the Court said that an appellate court must engage in a "*de novo* review," *id.* at 508 n.27, and "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars entry of any judgment that is not supported by clear and convincing proof of 'actual malice,'" *id.* at 511. The requirement of independent review in cases raising First Amendment issues was reiterated again in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989), and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990).

Despite this Court's clear and unequivocal adherence to this standard in First Amendment cases, the Oklahoma Court of Civil Appeals inexplicably chose an unconstitutionally deferential standard by which to review the actual malice determination of the jury in this defamation and false light case. Instead of an "independent examination of the whole record," *New York Times*, 376 U.S. at 285,[19] the Oklahoma court said "we may not disturb the jury's verdict where there is any competent evidence reasonably tending to support it," App. at 5a, even though "[t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990) (citing *Harte-Hanks*, 491 U.S. at 685). The court also said it would determine "the sufficiency of the evidence to sustain a judgment in light of the

19. *Cf. Bose*, 466 U.S. at 499 (describing duty alternatively as "independent examination of the whole record" and "independent examination of the entire record").

evidence tending to support it, together with all reasonable inferences deducible therefore, rejecting all evidence adduced by the adverse party which conflicts with it." App. at 5a-6a. Thus the Court of Civil Appeals exercised no independence of judgment, and its review was not of the whole record but was confined to searching only for evidence to support the verdict, ignoring any contrary evidence or inferences. Its opinion offers no justification for doing so.[20]

The Court of Civil Appeals failed to perform its judicial duty "as expositors of the Constitution" to prevent the entry of "any judgment that is not supported by clear and convincing proof of 'actual malice,'" *Bose*, 466 U.S. at 511; and for reasons unexplained, over the dissent of three justices, the Oklahoma Supreme Court also failed to perform that duty. It thus falls to this Court to do so.

> This Court 'has an "obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments," and in doing so, "this Court cannot avoid making an independent constitutional judgment on the facts of the case." *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) [opinion of Brennan, J.].' *Rosenbloom v. Metromedia*, 403 U.S. 29, 54 (1971) (opinion of Brennan, J. joined by Burger, C.J., and Blackmun, J.).

Bose, 466 U.S. at 508 n.27. This Court should therefore grant certiorari to reiterate the need for *state* appellate courts, as well as federal, to conduct an independent review in First Amendment cases. "The question whether the evidence in the record in a

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20. The sole citation of authority was *Florafax Intern., Inc. v. GTE Market Resources, Inc.*, 1997 OK 7, 933 P.2d 282, 287, a breach of contract case under Oklahoma common law not involving any First Amendment issues. Although Petitioners' certiorari papers in the Oklahoma Supreme Court clearly raised the independent-review-of-the-whole-record issue (App. at 71a-72a, 76a), the court's order denying certiorari is likewise silent as to how a deferential standard of review is consistent with the Constitution.

defamation case is of the convincing clarity to strip the utterance of First Amendment protection is not merely a question for the trier of fact," *Bose*, 466 U.S. at 511, as the Court of Civil Appeals seemed to believe it to be. Rather, it is a question to be addressed, independently, on the whole record, by the appellate court, because the federal constitutional rule of independent review "reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Bose*, 466 U.S. at 510-11.

III. An Independent Review of the Evidence Mandates Reversal of the Jury Finding of Actual Malice.

Had the Court of Civil Appeals properly exercised its constitutional obligation to conduct an independent review of the entire record in this case instead of looking solely at evidence favorable to Mitchell, it would have been compelled to conclude that the plaintiff did not make the clear and convincing showing of actual malice necessary for liability on the defamation claim,[21] for liability on the false light claim, and for punitive damages. Independent review of the whole record would have resulted in reversal of the judgment and entry of judgment for petitioners.

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21. Mitchell, as a private figure, would ordinarily have to prove professional negligence, not actual malice, to establish the fault element of his defamation claim. *See Malson v. Palmer Broadcasting Group*, 1998 OK CIV APP 68, ¶ 4, 963 P.2d 13, 14 (private figure must establish negligence based on expert testimony of departure from customs and standards of the industry) (citing *Malson v. Palmer Broadcasting Group*, 1997 OK 42, 936 P.2d 940; *Martin v. Griffin Television, Inc.*, 1976 OK 13, 549 P.2d 85). However, to maintain a defamation claim under Oklahoma law, a private-figure plaintiff must "suffer an injury to reputation, which is the essence of an action for defamation." *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714, 719 (10th Cir. 2000) (applying Oklahoma law). Mitchell, who presented no competent evidence at trial of actual harm to reputation, and who had only marginal evidence of negligence, opted to try to prove actual malice on the theory, supported by the trial court's instructions, that injury to reputation could be presumed if he proved the higher level of fault.

The Court of Civil Appeals' crabbed interpretation of KWTV's reports about Mitchell's involvement with Doo Dominate and This Lady Sings, and its conclusion that the defendants recklessly disregarded the falsity of its reports, resulted from the court's failure to review the entire record. The gist of the reports about This Lady Sings was that Mitchell had administered a "block" (as he himself admitted) that masked the pain being experienced by the horse; that the block may have affected the horse's championship performance contrary to the sponsoring organization's rules; and that in his federal court complaint, the buyer of the horse accused the seller of undertaking to disguise the condition of the horse. The gist of the report about Doo Dominate was that in an important race, the horse ran doped up and with a broken knee; that the horse broke down and had to be destroyed; and that Mitchell, who had worked on the horse illegally and was the last vet treating the horse for injury, was thereby suspected of helping kill the animal.

The Court of Civil Appeals ignored all of the evidence, detailed above, that Halsne had sources for each of the broadcast statements or that otherwise would support Petitioners' testimony that they believed what was reported to be true. Instead, the court arrived at its own interpretation of isolated documents, then concluded that KWTV's broadcast reports were contrary to that interpretation. From that conclusion, the court inferred both that the broadcast reports were false and therefore (because Halsne had a copy of the documents) that he recklessly disregarded the truth. Of course, contrary to the Court of Civil Appeals' truncated analysis, actual malice "cannot be established merely by showing that the publication was erroneous, derogatory or untrue." *Herbert v. Oklahoma Christian Coalition*, 1999 OK 90, ¶ 22, 992 P.2d 322, 329 (citing *Capital-Gazette Newspaper, Inc. v. Stack*, 445 A.2d 1038, 1044 (Md.), *cert. denied*, 459 U.S. 989 (1982) (citing *Gertz, supra*, 418 U.S. at 340-41; *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *New York Times, supra*, 376 U.S. at 281)).

An independent review of the whole record reveals that Mitchell did not meet his "burden of offering some extrinsic evidence of [Petitioners'] actual malice," *Revell v. Hoffman*, 309 F.3d 1228, 1233 (10th Cir. 2002). The Court of Civil Appeals fashioned its own test of actual malice—Petitioners' possession of documents that the Court of Civil Appeals interpreted to be contrary to its own interpretation of the broadcast reports—without reference to actual (let alone clear and convincing) evidence that KWTV and Halsne engaged in "either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity.'" *St. Amant*, 390 U.S. at 731. This Court should grant certiorari and direct the entry of judgment for Petitioners, because "[t]o permit the infliction of financial liability upon petitioners for [broadcasting] these [news reports] would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments." *Greenbelt Coop. Pub. Co. v. Bresler*, 398 U.S. 6, 14 (1970).

IV. A Publisher's Rational Interpretation of Public Documents, Especially When Supported by an Official Spokesperson for a Public Agency, Cannot Be the Basis of an Actual Malice Finding Even Where the Jury Perceives a Discrepancy Between the Spokesperson's Version of Events and Documents in the Agency Files.

The published opinion of the Oklahoma Court of Civil Appeals unduly imperils the First Amendment rights of any publisher or broadcaster who bases a report about historical events on a rational interpretation of documents from, and on the statements of an official spokesperson for, a government agency that conducted official proceedings investigating the event. Certiorari should be granted to dispel the impression created by the Court of Civil Appeals' decision that a jury can find actual malice clearly and convincingly in the perceived disparity between information a publisher rationally gleans from documents and learns from the official spokesperson of a public agency and the jury's contrary interpretation of isolated documents from the agency's file.

Beginning with *voir dire* of the jury and opening statements, Mitchell's principal focus during the trial was on KWTV's broadcast reports discussing or alluding to Mitchell's difficulties in New Mexico related to his treatment of Doo Dominate. His theory of "reckless disregard," in the presentation of evidence and in his closing argument to the jury, was that the extensive files generated during the NMHRC investigation into the breakdown of Doo Dominate contained documents arguably at odds with what Wayne Conwell, the lead investigator for the NMHRC, told Halsne, and that Halsne recklessly disregarded the truth by not examining each and every document in the file. For example, Mitchell presented evidence to the jury that the NMHRC file showed a split sample of Doo Dominate's urine tested negative for mepivicaine (*see* App. at 11a) and that charges against the owner and trainer of the horse that they had drugged Doo Dominate were dropped (*see* App. at 12a). He argued to the jury, therefore, that Petitioners recklessly disregarded the truth in reporting that Doo Dominate ran "doped up," despite the information (including official documents) Halsne received from Conwell that the NMHRC's test for mepivicaine was positive; that the split sample was actually positive, but the independent lab used a different standard than that accepted by the state; and that the State Chemist had certified a positive drug test result. Similarly, Mitchell pointed to the NMHRC's Decision and Order, which said evidence presented at a hearing was insufficient to prove the allegation that Mitchell had assisted the owner and trainer to race an unfit horse (*see* App. at 11a), as exonerating him from having anything to do with the death of the horse. He therefore argued that Petitioners recklessly disregarded the truth in reporting that Mitchell was "suspected of helping kill the horse," despite Conwell's explanation to Halsne that the order was not an exoneration because (as the order revealed on its face) the state had elected not to present any evidence from the investigation regarding the cause of Doo Dominate's breakdown, choosing instead to put on evidence only of Mitchell's illegal veterinary practice at the track, which was sufficient to revoke his license. Finally, Mitchell presented

evidence that he was not charged with giving the horse mepivicaine (*see* App. at 11a). He argued to the jury that Petitioners recklessly disregarded the truth in reporting that he was linked to the doping of the horse, despite Conwell's testimony that Mitchell was the most probable suspect and that he told Halsne he personally believed, based on his investigation, that Mitchell was likely responsible.[22]

Throughout his evidence and argument, Mitchell contended that Halsne failed to investigate Mitchell's role with Doo Dominate thoroughly enough, and that his reckless disregard for the truth was represented by his failure to look at all the documents in the NMHRC files. In its opinion, the Court of Civil Appeals accepted as adequate evidence of actual malice the simple proof that isolated documents in a public file were arguably inconsistent with what was reported. Given the emphasis placed on the theory during trial, the Court of Civil Appeals must have also accepted the idea that Petitioners' purported failure to investigate was itself, or together with Mitchell's "inconsistency" theory, clear and convincing proof of actual malice.[23]

Mitchell's trial theme, accepted by the Court of Civil Appeals, finds no support in First Amendment jurisprudence. This Court has repeatedly said that failure to investigate does not constitute actual malice. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989); *Gertz v. Robert*

22. Because the Court of Civil Appeals ignored all evidence favorable to Petitioners under its deferential standard of review, the opinion fails to reflect the substantial evidence in the whole record that supports both the accuracy of what was reported and the basis on which Petitioners believed what they were reporting was true. In particular, it makes no reference to Conwell's trial testimony that KWTV's broadcasts correctly reported the facts and accurately reflected what he had told Halsne.

23. With respect to the evidence regarding the reports about Doo Dominate, the Court of Civil Appeals opinion says only that "[t]here is evidence Halsne knew the statement was false or acted with reckless disregard of whether it was false or not." App. at 14a. It does not identify what that evidence is.

Welch, Inc., 418 U.S. 323, 332 (1974); *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968). "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant*, 390 U.S. at 731. Even an "extreme departure" from standards employed by reasonably prudent publishers does not suffice. *Harte-Hanks*, 491 U.S. at 666. Rather, there must be clear and convincing evidence that the publication was made with a "high degree of awareness of . . . probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), or "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant*, 390 U.S. at 731. However it may be described, the actual malice "standard is a subjective one." *Harte-Hanks*, 491 U.S. at 688.

Especially troubling is the implicit conclusion of the Court of Civil Appeals that a publisher or broadcaster can be held to have acted with actual malice if its interpretation of documents in a public agency's file, molded and shaped by information obtained from the official spokesperson for the agency, is perceived later to be at odds with the jury's (or reviewing court's) own reading of the documents. The Court of Civil Appeals interpreted the NMHRC Decision and Order to exonerate Mitchell from wrongdoing in the breakdown of Doo Dominate: "[T]he order specifically concluded the evidence was insufficient to prove Mitchell assisted the owner and trainer in running an unfit horse." App. at 11a. Yet Halsne received an official explanation of the order from Conwell, the lead investigator and spokesperson for the agency, that (as the order itself said) the evidence "presented at the hearing" was insufficient. Conwell explained to Halsne why no evidence about the cause of Doo Dominate's breakdown, or who might be responsible for it, was presented at the hearing to revoke Mitchell's owner's license, and why the order did not exonerate Mitchell.

KWTV's news report about the New Mexico proceedings was based on a rational interpretation of the NMHRC order (and other documents as well) supported by the official

spokesperson for the agency.[24] Nevertheless, the Court of Civil Appeals concluded that the interpretation was false and that the false interpretation of a document Halsne possessed before the broadcast was itself sufficient proof to support the jury finding of actual malice. App. at 10a-14a. Such a conclusion is forbidden by the First Amendment. "The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying on ambiguous sources." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519 (1991). Even accepting the Court of Civil Appeals' interpretation of the facts and its conclusion that KWTV's report was erroneous,[25] Petitioners' description of the events surrounding the breakdown of Doo Dominate, and Mitchell's role in the horse's death, was "'one of a number of rational interpretations' of an event 'that bristled with ambiguities and descriptive challenges for the writer.'" *Bose*, 466 U.S. at 512 (quoting *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971). If in scripting KWTV's broadcast reports Halsne failed to describe the event accurately, or misinterpreted the nature and scope of Mitchell's involvement, his "choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella." *Bose*, 466 U.S. at 513.

Indeed, any publisher faced with an extensive investigative file would, under the Court of Civil Appeals' approach, be at risk in reporting his interpretation of the investigated event because there would invariably be, as there were in this case, conflicting documents among witness statements, memoranda, notes, and other communications in the public file. Nor could

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24. Petitioners argued in their appellate briefs that their rational interpretation of the events in New Mexico foreclosed any finding of actual malice. The Court of Civil Appeals did not discuss the issue in its opinion.

25. That interpretation, of course, was driven by the court's erroneous standard of review that rejected all evidence favorable to Petitioners.

safety from an accusation of actual malice be found in obtaining the views of the official spokesperson for the public agency supporting the reporter's interpretation because, if the Court of Civil Appeals' analysis were correct, a jury's later interpretation of the documents is conclusive of their meaning. The publisher is at risk of a finding of actual malice if there simply is disparity between what the reporter rationally says the facts appear to be and what the jury concludes the facts are after considering isolated documents from the public file. This approach subverts the protections carefully crafted by this Court in its case-by-case adjudication of the meaning of actual malice.

> The publisher who maintains a standard of care such as to avoid knowing falsehood or reckless disregard of the truth is thereby given assurance that those errors that nonetheless occur will not lay him open to indeterminate financial liability. This protection would not exist for errors of interpretation were the analysis of the Court of [Civil] Appeals to be adopted, for once a jury was satisfied that the interpretation was 'wrong,' the error itself would be sufficient to justify a verdict for the plaintiff.

Time, Inc. v. Pape, *supra*, 401 U.S. at 291.

"[E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times*, 376 U.S. at 271-272. The Court of Civil Appeals' decision leaves no breathing space. This Court should grant certiorari to reiterate that the First Amendment protects the kind of rational interpretation identified in *Time, Inc. v. Pape* and *Bose* and reflected in Petitioners' report about Mitchell.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION III DATED AND FILED SEPTEMBER 6, 2002

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA

DIVISION III

Case No. 96,640

H.L. MITCHELL,

Plaintiff/Appellee,

vs.

GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation, and CHRIS HALSNE, an individual,

Defendants/Appellants.

APPEAL FROM THE DISTRICT COURT OF
CREEK COUNTY, OKLAHOMA

HONORABLE JOE SAM VASSAR, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

OPINION BY CAROL M. HANSEN, Presiding Judge:

Defendant/Appellants, Griffin Television, L.L.C. (Griffin) and Chris Halsne (collectively KWTV), seek review of the trial court's judgment based on a jury verdict in favor of

Plaintiff/Appellee, H.L. Mitchell. We affirm as to the finding of liability and award of punitive damages, reverse as to compensatory damages, and remand for new trial as to compensatory damages.

Mitchell is a veterinarian in Bristow, Oklahoma. Between January 27, 1998, and September 13, 1998, KWTV broadcast seven stories dealing with Mitchell's treatment of a halter horse named This Lady Sings at the 1997 World Quarter Horse Championships in Oklahoma City and the death of a quarter horse named Doo Dominate at the All American Futurity in New Mexico on September 5, 1994. Mitchell sued KWTV for defamation and false light invasion of privacy arising from the stories.

A jury trial took place in June 2001. At the close of evidence, KWTV moved for a directed verdict. The trial court denied the motion and submitted the case to the jury. The jury specially found Griffin and Halsne acted in reckless disregard of the truth of the statements published and intentionally and with malice concerning Mitchell. It awarded $6,000,000.00 in actual damages against Griffin and Halsne, $250,000.000 in punitive damages against Griffin, and $250,000.00 in punitive damages against Halsne. The trial court granted judgment for the verdict amount, as well as $1,323,950.00 in prejudgment interest and $5,010.02 in costs, for a total judgment amount of $7,828,960.02. KWTV appeals from that judgment.

Appendix A

I

One group of KWTV's contentions raises the issue of whether there was sufficient evidence for the jury to hold KWTV liable to Mitchell. KWTV argues the trial court should have directed a verdict in its favor because Mitchell (1) failed to present evidence from which a jury could reasonably conclude any of the statements about which he complained is substantially false, (2) presented no evidence of special damages to support a defamation *per quod* claim, (3) failed to submit expert testimony that KWTV departed from the standard of care to which reasonable journalists ordinarily adhere under similar circumstances, (4) failed to present clear and convincing evidence of actual malice, and (5) put on no evidence any harm to his reputation was caused by false statements rather than true ones. Because the last contention relates to damages, we will address it in Part II below.

In order to recover for defamation, a private figure must prove (1) a false and defamatory statement, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher; and (4) either the actionability of the statement irrespective of special damage, or the existence of special damage caused by the publication. *Sturgeon v. Retherford Publications, Inc.*, 1999 OK CIV APP 78, 987 P.2d 1218, 1223. If the publication is a fair and true report of a proceeding authorized by law or anything said in the proceeding, it is privileged. 12 O.S.1991 § 1443.1(A). Negligence is the failure to exercise ordinary care, which is "that degree of care which ordinarily prudent persons engaged in the same kind of business usually exercise under similar

circumstances." *Martin v. Griffin Television, Inc.*, 1976 OK 13, 549 P.2d 85, 92. Slander is actionable *per se*, without a showing of actual damage, if it falls within the first four sections of 12 O.S.1991 § 1442.[1] *Standifer v. Val Gene Management Services, Inc.*, 1974 OK CIV APP 41, 527 P.2d 28, 31.

While negligence is the minimum level of fault necessary for a private figure to recover for slander, the plaintiff may expand the relief available by showing greater culpability

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1. 12 O.S.1991 § 1442 provides,

> Slander is a false and unprivileged publication, other than libel, which:
>
> 1. Charges any person with crime, or with having been indicted, convicted or punished for crime.
>
> 2. Imputes in him the present existence of an infectious, contagious or loathsome disease.
>
> 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit.
>
> 4. Imputes to him impotence or want of chastity; or,
>
> 5. Which, by natural consequences, causes actual damage.

on the defendant's part. Upon a showing of actual malice, the plaintiff may recover punitive damages, and, where otherwise allowed, presumed damages.[2] *Martin v. Griffin Television, Inc.*, 1976 OK 13, 549 P.2d 85, 93. "Actual malice" means "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). Proof of malice obviates the need to prove negligence.

In order to recover for false light invasion of privacy, the plaintiff must show (1) the defendant gave publicity to a matter concerning the plaintiff that placed the plaintiff before the public in a false light, (2) the false light in which the plaintiff was placed would be highly offensive to a reasonable person, and (3) the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. *McCormack v. Oklahoma Pub. Co.*, 1980 OK 98, 613 P.2d 737, 740.

In reviewing a judgment based on a jury verdict, we may not disturb the jury's verdict where there is any competent evidence reasonably tending to support it. The jury is the exclusive arbiter of the credibility of the witnesses, and its verdict is conclusive as to all disputed facts and all conflicting statements. We must determine the sufficiency of the evidence to sustain a judgment in light of the evidence tending to support it, together with every reasonable inference deducible therefrom, rejecting all evidence adduced by the

2. See Part II below for a discussion of presumed damages.

adverse party which conflicts with it. *Florafax Intern., Inc. v. GTE Market Resources, Inc.*, 1997 OK 7, 933 P.2d 282, 287. As to the element of malice, the evidence must be sufficient for a trier of fact to find or infer its existence subject to a clear and convincing standard of proof. *Herbert v. Oklahoma Christian Coalition*, 1999 OK 90, 992 P.2d 322, 328. This standard applies to both public officials and private figures. *Gaylord Entertainment Co. v. Thompson*, 1998 OK 30, 958 P.2d 128, 141 n. 46. However, it does not apply to any element other than malice.

The news stories of which Mitchell complains began with reports relating to This Lady Sings. Mitchell testified he examined the horse soon after she was unloaded at the fairgrounds before the horse show. He said she was "a little tender on her right front foot" and had twisted her shoe. He testified he told the trainer the horse needed a farrier. Mitchell said the trainer was unable to find a farrier that evening and was worried the horse would "fret all night and gan up and lose weight and quit drinking." Mitchell said he wrapped her foot, but could see she was not very comfortable on it, so he "did a Sarapin posterior digital heel block on her" with "three-quarters of a cc" of Sarapin, which was "a minute amount." He said Sarapin is called a natural block in holistic circles and wears off in 24 to 36 hours. Mitchell testified This Lady Sings was not hobbling when he saw her.

This Lady Sings was sold after the show. On January 21, 1998, her purchaser sued the sellers and trainer in federal district court for rescission of the contract and damages for breach of warranty and fraud in the inducement of the contract. The complaint alleged as follows:

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12. That on November 15, 1997, Skoda [the purchaser] had the mare inspected by Dr. Mitchell, a veterinarian on the grounds of the show, who conducted a prepurchase exam of the horse and represented to Skoda, and his insurer, that the horse was sound.

. . .

16. That the mare was then presented to the previous examining veterinarian, which [sic] found some bruising on the hoof wall, apparently related to improper shoeing and that silicone had been placed under the pad of the mare's left hoof; the silicone pads prevented a clear view of the sole at the time of the original purchase examination.

. . .

19. That Skoda conducted a further investigation into the unsoundness of the mare and later on November 22, 1997, learned from Dr. Mitchell that prior to the Amateur Division Showing, he had "blocked" one of Casper's adult horses scheduled to appear in the Amateur Division showing; said block being a veterinary technique to numb pain, so that the horse will not present outward manifestation of pain, or unsound gate.

> 20. That Casper had only one adult horse to be presented and [sic] the said showing, to wit; "This Lady Sings".
>
> 21. That Casper knew that the mare was unsound at the time of the negotiations with Skoda and had undertaken specific overt acts to disguise the lame condition.

In the January 26, 1998 10:00 p.m. news broadcast, Halsne reported,

> This Lady Sings was named best-amateur-in-the-world just three months ago. Now, her new trainer . . . says lameness in her front feet have [sic] ended the horse's career. . . .
>
> There is a dark secret to this horse's injury. . One the American Quarter Horse Association has under investigation. This Lady Sings was hobbling before the World Championships . . . and was given a painkiller. . . .
>
> What [Mitchell] did was put a chemical called Sarapin in her foot to mask the pain.

Prior to the next evening's broadcast, KWTV ran a promotional tape in which the announcer stated, "An Oklahoma vet linked in a federal lawsuit to masking the injuries of a champion show horse." In the 10:00 p.m. broadcast, Halsne reported,

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> The federal case says Mitchell knew that This Lady Sings was hobbling before the world show. Afterwards, he examined the horse for a new buyer and didn't disclose the mare's previous injury. . . .
>
> Dr. Mitchell claims the horse was badly shod when it came to the world championships, and he simply treated a bruise. The new buyer says the horse's health condition is chronic.

At trial, Halsne testified he was familiar with the complaint and had it in his possession prior to airing the story.

The complaint in the federal suit did not say Mitchell knew the horse was hobbling before the horse show. While it did accuse the trainer of acting with the purpose of disguising, or masking, the horse's lame condition, it did not allege Mitchell acted with that purpose. It alleged Mitchell told the buyer he blocked the horse. It alleged the block is a veterinary technique to numb pain, so that the horse will not appear unsound, but it did not allege Mitchell intended it for the purpose of masking the horse's unsoundness. The complaint did not accuse Mitchell of concealing the horse's condition when he did the prepurchase exam; rather it alleged the horse's condition was concealed from Mitchell by the silicone pad on the mare's left hoof.

Halsne's statements do not truly and fairly report the allegations in the complaint. Therefore, his publication is not privileged pursuant to 12 O.S.1991 § 1443.1(A). The complaint itself, when compared with Halsne's statements, is evidence from which the jury could find Halsne made false

and defamatory statements to third parties about Mitchell and that the statements tended to injure Mitchell in his profession. Halsne's own admission he was familiar with the complaint is clear and convincing evidence from which the jury could find he made the statements with reckless disregard as to their falsity. Because Mitchell put on evidence of malice, he did not need to prove negligence. The statements were defamatory *per se* and not *per quod*; therefore, Mitchell did not need to prove special damages in order to establish liability for slander pursuant to 12 O.S.1991 § 1442(3). This same evidence would support a finding by the jury of each of the elements of a false light invasion of privacy claim.

The jury's verdict is also supported by the evidence relating to the news stories about Doo Dominate. Mitchell treated Doo Dominate prior to the 1994 All American Futurity race at Ruidoso Downs racetrack in New Mexico. During the race, the horse stumbled and broke both front legs. Track veterinarians euthanized the horse, took blood and urine samples, and removed his front legs for necropsy. Two other horses broke down and were euthanized that day.

Wayne Conwell, the Medication Manager for the New Mexico State Racing Commission (NMSRC), investigated Doo Dominate's breakdown. He sent the samples for testing and the legs for necropsy. The necropsy report concluded,

> This horse had chronic severe carpal joint disease affecting the left carpus. There were chronic and acute fractures of the radial carpal bone and the 3rd carpal bone in the left carpus.
>
> . . .

> In summary, the chronic carpal joint disease in the left carpus appeared severe enough to make this horse unfit for racing. Acute left carpal breakdown may have been responsible for the acute fracture of the cannon bone in the opposite leg.

The laboratory to which Conwell sent the urine sample reported the sample tested positive for mepivacaine, a prohibited pain-killer.[3] The horse's owner exercised his right to send a split sample to an independent laboratory. That laboratory's results failed to confirm the presence of mepivacaine.

The NMSRC issued a Notice of Contemplated Commission Action against Mitchell, charging him with practicing veterinary medicine in New Mexico without a license and with assisting Doo Dominate's owner and trainer in running an unfit horse. It did not charge him with giving the horse mepivacaine. After a hearing, the NMSRC issued an order finding Mitchell practiced veterinary medicine at Ruidoso Downs without holding a license issued by the New Mexico Board of Veterinary Examiners. It permanently revoked his owner's license.[4] However, the order specifically concluded the evidence was insufficient to prove Mitchell assisted the owner and trainer in running an unfit horse.

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3. At the time of the 1994 race, mepivacaine was prohibited within 72 hours of race day. However, the NMSRC later amended its rules to allow a threshold amount of the drug.

4. The owner's license permitted Mitchell access to the track as a horse owner.

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The NMSRC brought a separate action against the owner and trainer for the use of mepivacaine. It later dismissed those charges because the results of the independent laboratory did not confirm the presence of mepivacaine in Doo Dominate's urine sample.

Halsne said he looked at these documents before airing his report. He testified,

> We were looking for specific documents that support the allegations in front of us about Dr. Mitchell[,] about Doo Dominate. . . . [W]e couldn't read every word of those documents and didn't. We were looking for key pieces that would support our story and maybe shed some light on some areas that didn't support our story. . . .
>
> . . .
>
> [W]e had already done a couple of stories about Dr. Mitchell, and so when we went down we wanted to — I mean our concentration was on ties in [sic] Dr. Mitchell and the death of Doo Dominate and how close those ties were and what they were.

On February 4 and 5, 1998, KWTV repeatedly aired a promotional tape stating, "You'll be appalled by what racing officials say this vet has done." In the 10:00 p.m. newscast on February 5, 1998, the anchor introduced Halsne's story, stating,

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> [A]n Oklahoma veterinarian is the target of a News Nine investigation tonight. Not only is he accused in a federal lawsuit of giving a world-class quarter horse painkillers before a show here, he's also suspected of killing one of the country's top racehorses. . . . Lead investigator, Chris Halsne has discovered that Dr. Mitchell has a troublesome past. . . .

Halsne then reported,

> [T]his incident isn't the first time Mitchell has been in trouble for his veterinary practices.
>
> Doo Dominate bolted out of Gate 9 during the 1994 All-American Futurity at Ruidoso Downs. One hundred yards from the finish, the powerful colt stumbled, broke both legs, and had to be euthanized. The New Mexico Racing Commission conducted an extensive investigation. An exam afterward showed Doo Dominate competed doped up and with a broken knee.

On March 26, 1998, the anchor introduced another story about Mitchell, stating, "A few months ago a News Nine investigation showed how Mitchell was connected to the doping of a world-class racehorse and a world champion show horse." Halsne then reported on the rescission of Mitchell's Oklahoma racing license.

This record presents sufficient evidence from which the jury could find Halsne falsely reported the NMSRC found Doo Dominate raced doped-up and Mitchell was linked to

the doping. There is evidence Halsne knew the statement was false or acted with reckless disregard of whether it was false or not. A reasonable jury could find the statement injured Mitchell's professional reputation. The statement was not a true and fair report of the NMSRC proceeding and therefore is not privileged pursuant to 12 O.S.1991 § 1443.1(A).

Accordingly, we hold there was sufficient evidence for the jury to hold KWTV was liable to Mitchell for slander and false light invasion of privacy.

II

Another group of KWTV's contentions of error relate to the compensatory damages award. KWTV argues (1) the trial court erred in instructing on presumed damages, (2) Oklahoma law does not permit presumed damages in a defamation case against the media even when actual malice is shown, (3) presumed damages can only be nominal, (4) the compensatory damages awarded bear no rational relationship to the demonstrated harm and are so excessive as to shock the conscience, and, as noted in Part I above, (5) Mitchell put on no evidence any harm to his reputation was caused by false statements rather than true ones.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the United States Supreme Court established the rule requiring proof of actual malice in order for public officials to recover for defamation. It later extended the rule to public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct.

2997, 41 L.Ed.2d 789 (1974), the Court considered whether to apply the *New York Times* standard to private individuals. It declined to do so, reasoning states have a greater interest in protecting private individuals than public figures from defamation because private individuals have less access to communication channels to counteract false statements and therefore are more vulnerable to injury. *Id.*, 418 U.S. at 344, 94 S.Ct. at 3009. The Court stated,

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

However, the Court then balanced the media's First Amendment rights against the States' legitimate interest in compensating private individuals for injury to reputation:

> [T]his countervailing state interest extends no further than compensation for actual injury. . . . [W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

418 U.S. at 349, 94 S.Ct. at 3011.[5]

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5. The Court further explained its holding:

> The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory

(Cont'd)

(Cont'd)

> damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. . . .
>
> We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

(Cont'd)

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The Oklahoma Supreme Court addressed the application of *Gertz* to then-existing Oklahoma law in *Martin v. Griffin Television, Inc.*, 1976 OK 13, 549 P.2d 85. At that time, Oklahoma statutes allowed a presumption of malice from the publication of unprivileged, defamatory matter. The Court held those statutes were unconstitutional under *Gertz* because a presumption of malice allows liability without fault. It then chose negligence as the appropriate standard of liability for the publisher of a defamatory falsehood injurious to a private individual in Oklahoma.

The Oklahoma Supreme Court also overruled as unconstitutional a statutory section requiring a minimum judgment of one hundred dollars because the statute required no proof as to that minimum amount. It stated, "This is a presumed damage not allowed by *Gertz* without evidence and a finding of actual malice." *Id.* at 93.

(Cont'd)

> We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. . . . Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. . . . In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.

418 U.S. at 349-350, 94 S.Ct. at 3011-3012.

KWTV argues the statute overruled in Martin was the only source of presumed damages in Oklahoma, and no cases following *Martin* have allowed presumed damages. As we discussed in Part I, 12 O.S.1991 § 1442 authorizes actions for slander *per se*, without a showing of actual damage, for false and unprivileged publications falling within the first four sections of the statute. Therefore, the Legislature contemplated presumed damages for slander *per se*. In light of *Gertz*, though, presumed damages are only allowed where actual malice is shown.

However, the Legislature has set forth an exception to the allowance of presumed damages in 12 O.S.1991 § 1447.3 (emphasis added):

> In any action for damages for any defamatory statement published in or uttered as a part of a television and/or radio broadcast, the complaining party shall be allowed such actual and/or punitive damages *as he has alleged and proved.*

This statute is controlling in the instant case. Damages must be proved, not presumed. The trial court erred in instructing the jury (1) the law presumes Mitchell suffered general damages if he showed KWTV acted with malice, and (2) it may award presumed, general damages without proof of harm. Therefore, the trial court's judgment for compensatory damages is reversed and this matter must be remanded for new trial as to the issue of compensatory damages only.[6] On remand, Mitchell must

6. A new trial may be granted on the issue of damages only in cases where it is clear the error in assessing damages did not affect the entire verdict. *Fields v. Volkswagen of America, Inc.*, 1976 OK 106, 555 P.2d 48, 53.

prove his damages proximately resulted from the defamatory statements, but he is not limited to his out-of-pocket loss. He may recover for loss of profits as well as impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering, subject to proof. *Martin v. Griffin Television, Inc.*, 549 P.2d at 93.

Because we reverse the trial court's judgment as to compensatory damages, we need not reach KWTV's contentions that presumed damages can only be nominal and the verdict was excessive.

III

KWTV next contends the trial court erred as a matter of law in failing to determine certain statements were not actionable. It argues one group of statements were not actionable because they were not about Mitchell or were not defamatory. In its reply brief, KWTV argues the broadcasts should be viewed as a whole, with the statements considered in context. The gist of the broadcasts as a whole is that Mitchell doped horses to conceal their injuries. The statements in the context of the broadcasts are about Mitchell and are defamatory.

KWTV argues another group of statements were privileged pursuant to 12 O.S.1991 § 1443.1. As we discussed in Part I, KWTV's statements did not truly and fairly report legal proceedings. Therefore, its statements are not privileged.

KWTV argues two of the statements were protected opinion. These statements were that the death of one horse was connected to the doping of the other horse and that Mitchell was connected to the doping of both horses. The questions of whether the horses were doped and whether Mitchell was connected to their doping are sufficiently factual to be susceptible of being proved true or false. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21, 110 S.Ct. 2695, 2707, 111 L.Ed.2d 1 (1990). Therefore, the statements are not protected opinion.

IV

KWTV's next group of contentions relate to jury instructions. In reviewing jury instructions on appeal, we must consider the instructions as a whole. The instructions need not be ideal but must reflect Oklahoma law regarding the subject at issue. The test for error in instructions is whether the jurors were probably misled regarding the legal standards they should apply to the evidence. We will not reverse a judgment based on error in instructing the jury unless it clearly appears the instructions given or refused caused a miscarriage of justice. *King v. Neal*, 2001 OK CIV APP 11, 19 P.3d 899, 902.

KWTV first argues the trial court erred in refusing to pre-instruct the jury on the elements of Mitchell's claims and on the definition of actual malice, thus allowing the jury to be "infected with prejudicial evidence and argument." Even if pre-instruction would have been helpful, the jurors received the necessary instructions before they began deliberations. We find no error in the trial court's action.

KWTV next argues the trial court erred in refusing to give constitutionally adequate instructions because it refused to give an instruction regarding what is not actual malice. The jury instructions defining actual malice correctly state Oklahoma law. We are unable to conclude the jurors were probably misled regarding the legal standards they should apply to the evidence.

KWTV also argues the trial court inadequately defined negligence and direct cause. KWTV fails to support this contention with citations of authority. Accordingly, we will treat it as waived. *Messler v. Simmons Gun Specialties, Inc.*, 1984 OK 35, 687 P.2d 121, 129 n. 11.

We addressed the trial court's error in instructing on presumed damages in Part II above. KWTV's next contention is the trial court erred in refusing to give special interrogatories to the jury asking which statements it found to be actionable. The Oklahoma Constitution, Art 7, § 15, requires that all jury verdicts be general verdicts. The trial court has discretion to direct special findings. *Id.* We will not reverse a trial court under abuse of discretion unless it made a clearly erroneous conclusion and judgment, against reason and evidence. *Broadwater v. Courtney*, 1991 OK 39, 809 P.2d 1310, 1312. KWTV has failed to show any abuse of discretion in the trial court's refusal to give special interrogatories.

KWTV's last argument regarding jury instructions is the trial court erred in instructing on Category II punitive damages because Mitchell failed to show KWTV acted with malice. As we discussed in Part I, Mitchell put on evidence

from which the jury could find malice. Therefore, the trial court properly instructed the jury on Category II punitive damages pursuant to 23 O.S.Supp.1995 § 9.1(C).[7]

The jury awarded punitive damages of $250,000.00 against each defendant. This award would be within the statutory limit set forth for Category II punitive damages regardless of the amount of compensatory damages awarded on remand. However, should the jury and trial court find no actual damages on remand, the punitive damages award must be vacated because § 9.1(C) requires an

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7. 23 O.S.Supp.1995 § 9.1(C) provides,

> Category II. Where the jury finds by clear and convincing evidence that:
>
> 1. The defendant has acted intentionally and with malice towards others; . . .
>
> the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award exemplary damages in an amount not to exceed the greatest of:
>
> a. Five Hundred Thousand Dollars ($500,000.00),
>
> b. twice the amount of actual damages awarded, or
>
> c. the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff and other persons or entities.

award of actual damages before punitive damages may be awarded. Accordingly, we do not reverse the award of punitive damages, but instruct the trial court to vacate the punitive damages award in the event there is no award of compensatory damages on remand.

V

KWTV's last group of contentions relate to evidentiary rulings. It asserts the trial court made three errors in admitting Mitchell's evidence, but fails to show how the admission of the evidence affected a substantial right. It argues the trial court improperly excluded testimony from two of its witnesses, but fails to show how that evidence would tend to make the existence of a material fact more or less probable. Therefore, we may not predicate any reversible error upon the trial court's evidentiary rulings. 12 O.S.1991 § § 2104(A), 2401, and 2402.

For the foregoing reasons, the judgment of the trial court is AFFIRMED to the extent it found KWTV liable to Mitchell for slander and false light invasion of privacy and awarded punitive damages. It is REVERSED to the extent it awarded compensatory damages. This matter is REMANDED for new trial on the issue of compensatory damages only. The trial court is instructed to vacate the punitive damages award in the event there is no award of compensatory damages on remand.

The motion of The Reporters Committee for Freedom of the Press and others for leave to file an amicus curiae brief in this appeal was filed after the normal briefing cycle

set for the party to be supported. Because the amici have failed to show the requisite extraordinary cause for leave to file their brief, their motion is denied.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

ADAMS, J. AND MITCHELL, J., CONCUR.

APPENDIX B — AGREED ORDER DETERMINING PREJUDGMENT INTEREST AND COSTS OF THE DISTRICT COURT OF CREEK COUNTY, BRISTOW DIVISION FOR THE STATE OF OKLAHOMA DATED AND FILED AUGUST 21, 2001

IN THE DISTRICT COURT OF CREEK COUNTY
BRISTOW DIVISION
STATE OF OKLAHOMA

No. CJ 99 16 B

Judge Vassar

H. L. MITCHELL, D.V.M., an individual,

Plaintiff,

vs.

GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation; CHRIS HALSNE, an individual; and JOHN DOE, Channel 9's Producer, an individual,

Defendants.

AGREED ORDER DETERMINING PREJUDGMENT INTEREST AND COSTS

Now on this 21st day of August, 2001, the Court makes the following determination concerning prejudgment interest and costs. This Court finds that the prejudgment interest on the jury verdict in the referenced cause, by agreement of counsel for plaintiff and defendants, equals $1,323,950.00.

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This Court further finds that the total costs to be taxed against the Defendants in the referenced cause, by agreement of counsel for plaintiff and defendants, are $5,010.02. This Court further finds that the total amount of the resulting judgment in this action upon which postjudgment interest shall accrue, by agreement of counsel for plaintiff and defendants, equals $7,828,960.02.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Prejudgment Interest in this case equals $1,323,950.00, and that the costs to be taxed against the Defendants equal $5,010.02.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said amounts of prejudgment interest and costs shall be and are hereby added to the verdict of the jury herein to arrive at the "resulting judgment" upon which postjudgment interest shall accrue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the total amount of the resulting judgment in this action upon which postjudgment interest is accruing equals $7,828,960.02.

IT IS SO ORDERED this 21st day of August, 2001.

s/ Joe Sam Vassar
JUDGE OF THE DISTRICT COURT

APPENDIX C — JOURNAL ENTRY OF JUDGMENT OF THE DISTRICT COURT OF CREEK COUNTY, BRISTOW DIVISION, STATE OF OKLAHOMA DATED AND FILED JULY 6, 2001

IN THE DISTRICT COURT OF CREEK COUNTY
BRISTOW DIVISION
STATE OF OKLAHOMA

No. CJ 99 16 B
Judge Vassar

H. L. MITCHELL, D.V.M.,

Plaintiff,

vs.

GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation, and CHRIS HALSNE, an individual,

Defendants.

JOURNAL ENTRY OF JUDGMENT

NOW ON the 18th, 19th, 20th, 21st, 22nd, 25th, 26th and 27th days of June, 2001, having been regularly set on the Court's jury docket in the above captioned cause, the Plaintiff was present in person, and represented by his counsel of record, Douglas E. Stall of the law firm LATHAM, STALL, WAGNER, STEELE & LEHMAN; and the Defendants were present by and through their corporate representative and represented by their counsel of record, Robert D. Nelon and Jon Epstein of HALL ESTILL HARDWICK, GABLE, GOLDEN &

NELSON. The Plaintiff proceeded to put on his evidence and rested on June 25th, 2001. The Defendants then demurrered to the evidence, and said demurrer was overruled. The Plaintiff then demurrered to the evidence, and said demurrer was overruled. The Defendants then proceeded to put on their evidence and rested on June 26th, 2001. The Plaintiff moved for a directed verdict which was denied. The Defendants moved for a directed verdict which was denied. The jury was instructed as to the issues involved and the law to be applied. Counsel were each provided one hour for closing argument. The jury then retired to deliberate at 1:30 p.m. on the 27th day of June, and after due deliberation returned at 4:00 p.m. that day with Verdict Form No. 1 finding, by a vote of eleven to one, all issues in favor of the Plaintiff. The jury fixed the amount of actual damages in the amount of $6,000,000.00 (Six Million Dollars).

The jury also answered separate interrogatories finding by clear and convincing evidence that Defendant Halsne and Defendant Griffin Television, L.L.C., acted in reckless disregard for the truth. Accordingly, this matter was submitted to the jury in a separate proceeding to determine the issue of punitive damages.

The jury then retired to deliberate on the issue of punitive damages on the 27th day of June. After due deliberation, the jury returned with Verdict Form No. 1 — Second Stage, finding, by clear and convincing evidence with a vote of eleven to one, that Defendant Griffin Television, L.L.C., and Defendant Halsne acted intentionally and with malice concerning Dr. Mitchell. The jury fixed the amount of

punitive damages against the Defendant Griffin Television, L.L.C. in the amount of $250,000.00; and against the Defendant Halsne in the amount of $250,000.00.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that based upon the trial of this action and the decision of the jury herein, judgment in all respects is awarded and entered in favor of the Plaintiff. It is further ordered, adjudged and decreed, that the Plaintiff is entitled to actual damages in the amount of $6,000,000.00 plus all applicable interest and costs. It is further ordered, adjudged and decreed that the Plaintiff is entitled to punitive damages against the Defendant Griffin Television, L.L.C. in the amount of $250,000.00; and against the Defendant Halsne in the amount of $250,000.00.

DATED this 6 day of July, 2001.

s/ Joe Sam Vassar
HONORABLE JOE SAM VASSAR
JUDGE OF THE DISTRICT COURT

APPENDIX D — ORDERS OF THE SUPREME COURT OF THE STATE OF OKLAHOMA DATED NOVEMBER 26, 2002

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, November 26, 2002

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

96,640 H. L. Mitchell, D.V.M. v. Griffin Television; L.L.C. et al.

Both petitions for certiorari are denied.

CONCUR: Hodges, Lavender, Kauger, Summers, Winchester, JJ.

DISSENT: Watt, V.C.J., Opala, Boudreau, JJ.

s/ Joseph M. Watt
VICE CHIEF JUSTICE

APPENDIX E — VERDICT FORM NO. 1

IN THE DISTRICT COURT OF CREEK COUNTY
STATE OF OKLAHOMA
BRISTOW DIVISION

Case No. CJ-99-16-B
(Judge Joe Sam Vassar)

H. L. MITCHELL, D.V.M., an individual,

Plaintiff,

vs.

GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation, and CHRIS HALSNE, an individual,

Defendants.

VERDICT FORM NO. 1

We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find in favor of the Plaintiff, H. L. Mitchell on his (check those that apply):

☒ Defamation claim

☒ False light invasion of privacy claim

The dollar amount of his actual damages is the sum of $6,000,000.00

Appendix E

1. We do x do not __ (Check One) find by clear and convincing evidence that the Defendant, Griffin Television, L.L.C., acted in reckless disregard of the truth of the statements published.

2. We do x do not __ (Check One) find by clear and convincing evidence that the Defendant, Chris Halsne, acted in reckless disregard of the truth of the statements published.

s/ [illegible] Foreperson	s/ Jason Cooper
s/ [illegible]	s/ Nicole Carter
s/ Ruth Stark	s/ [illegible]
s/ La Donna Byard	s/ [illegible]
s/ Tammy McKay	s/ Helen Bass
s/ Edith Dawson	

APPENDIX F — VERDICT FORM NO. 1 — SECOND STAGE

**IN THE DISTRICT COURT OF CREEK COUNTY
STATE OF OKLAHOMA
BRISTOW DIVISION**

**Case No. CJ-99-16-B
(Judge Joe Sam Vassar)**

H. L. MITCHELL, D.V.M.,

Plaintiff,

vs.

GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation, and CHRIS HALSNE, an individual,

Defendants.

VERDICT FORM NO. 1 — SECOND STAGE

We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find in favor of the Plaintiff, H. L. Mitchell, and against Defendants on the issue of punitive damages.

a. We do ✓ do not __ (Check One) find by clear and convincing evidence that the Defendant, Halsne, acted intentionally and with malice concerning Dr. Mitchell.

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b. We do ✓ do not __ (Check One) find by clear and convincing evidence that the Defendant Griffin Television L.L.C., acted intentionally and with malice concerning Dr. Mitchell.

(In the event you do not find the defendants acted intentionally and with malice concerning Dr. Mitchell, then the punitive damages cannot exceed the greater of $100,000 or the amount of actual damages you have previously awarded)

We fix the dollar amount of punitive damages for Griffin Television L.L.C. in the sum of $250,000.00.

We fix the dollar amount of punitive damages for Chris Halsne in the sum of $250,000.00.

s/ [illegible]	s/ La Donna Byard
Foreperson	
s/ Helen Bass	s/ Ruth A. Stark
s/ [illegible]	s/ Nicole Carter
s/ [illegible]	s/ Jason Cooper
s/ Edith Dawson	s/ [illegible]
s/ Tammy McKay	

APPENDIX G — EXCERPTS FROM TRANSCRIPT OF KWTV NEWS REPORTS

JANUARY 26, 1998

Announcer: Tonight at 10:00 on News Nine, the Investigators. It was one of the top show horses in the world, but did an Oklahoma vet use drugs to help it win a major competition?

10:00 p.m. preshow

Kelly Ogle: The Investigators go inside the horse world for a surprising story.

10:00 p.m. newscast

Jenifer Reynolds: Allegations of cheating and drug use at the World Quarter Horse Championships is the focus of an exclusive News Nine investigation tonight.

Here's the horse at the center of a national debate going on in top show circles. Her name is This Lady Sings. She captured an amateur world title here in Oklahoma City just a few months ago.

Tonight we look at accusations that this horse won with the help of painkillers administered by an Oklahoma veterinarian.

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Lead Investigator Chris Halsne is on this case for us, and Chris, you have confirmed that the horse This Lady Sings was given a painkiller before the show.

Chris Halsne: Yes, that's right. The question is now though how long before the show . . and could the type of drug in this vial have altered the performance of a horse when she competed in the ring.

The Quarter Horse industry is a sub-culture of big money and serious competition. Some are in it for the love of animals . . some to win-at-all-costs.

There are casualties to the sport. This Lady Sings was named best-amateur-in-the world just three months ago. Now, her new trainer Jeff Alexander says lameness in her front feet have ended the horse's career.

Jeff Alexander: I can't show her. I cannot take her to a horse show like this. She will not compete.

Chris Halsne: There is a dark secret to this horse's injury . . one the American Quarter Horse Association has under investigation. This Lady Sings was hobbling before the

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World Championships . . and was given a painkiller.

News Nine's investigative team has learned that a veterinarian from Bristow, Oklahoma gave This Lady Sings a painkiller shot just days before the world competition in Oklahoma City. What he did was put a chemical called Sarupin in her foot to mask the pain. Sarapin is not a drug that the AQHA tests for.

We're here to talk to you about This Lady Sings . .

News Nine tracked down the vet in question, Doctor H.L Mitchell. He admits he injected the horse with Sarapin at the request of it's then owner, Thomas J. Offut.

You gave the horse a painkiller . . a vegetable-based painkiller?

Dr. Mitchell: When she first got there.

Chris Halsne: Mitchell defends the move . . saying he is sure the nerve block wore off before the competition.

Dr. Mitchell: Sarapin is a vegetable block. It lasts about 24 hours.

Chris Halsne: And that isn't illegal?

Dr. Mitchell: No.

Chris Halsne: So that's a legal substance to be in the horse?

Dr. Mitchell: It's non-testable.

Chris Halsne: We checked with numerous equine vets . . and they say Sarapin's length of effec-tiveness varies widely. Sarapin is a legal painkiller by prescription, but contest rules don't allow it. The American Quarter Horse Association's rules say "no foreign substance or drug which is of such character as could affect a horse's performance is acceptable."

Now, This Lady Sings stands in danger of losing her title . . and her net worth . . in a business where reputation means the world.

There is a lot more to this story. This Lady Sings was sold for top price . . more than 100-thousand dollars . . immediately after her win at the Quarter Horse World Championships. The person who purchased the horse has filed a federal civil suit against the previous owner and his agent . . claiming that they masked

the horse's injury . . just long enough to make the sale. We'll have more on that tomorrow night at ten.

Jenifer Reynolds: Chris, you've also found out in the course of researching this story that this painkiller . . Sarapin . . is becoming quite popular both at these horse shows . . and race tracks around the country.

Chris Halsne: Sadly it is. Track vets tell me that there has been a resurgence in the use of Sarapin. The painkiller isn't as effective as some other drugs on the market.. but because Sarapin doesn't show up on a drug test.. it's being used to help a horse perform at peak levels when it's sore . . or injured. Jenifer —

Jenifer Reynolds: All right, Chris. We'll look forward to your report tomorrow night. Thank you.

JANUARY 27, 1998

5:00 p.m. newscast

Robin Marsh: Coming up tonight at ten, our investigative team digs deeper into allegations that a top show horse was drugged during the World Quarter Horse Championships.

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Kelly Ogle: Interesting story. A civil lawsuit filed in federal court claims the owners of This Lady Sings sold an injured animal without telling the new buyers. News 9 has learned that a Bristow, Oklahoma, vet is a key witness to the deal. Dr. H.L. Mitchell gave This Lady Sings a pain-killer shot before the world show, but days later said the horse was healthy.

Dr. Mitchell: What I did to the horse was done when the horse first arrived at the show. It had completely worn off by the time the mare showed.

Kelly Ogle: This Lady Sings is just not any horse. It sold for $100,000 after winning an amateur world title here in Oklahoma City. Her new owner says he wouldn't have paid that much if he had known about any injuries to the horse's feet. Our lead investigator, Chris Halsne, will have more on this story tonight at ten. Interesting story.

Announcer: Tonight at 10:00 on News Nine. An Oklahoma vet linked in a federal lawsuit to masking the injuries of a champion show horse. A big money deal that prompts the Investigators to get involved.

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10:00 p.m. newscast

Jenifer Reynolds: A bitter dispute over the sale of one of the world's most prestigious quarter horses may be resolved in federal district court. We first reported to you last night allegations that a world amateur champion, this horse, This Lady Sings, competed several days after being given a nerve block for heel pain. News tonight lead investigator, Chris Halsne, looks at a deal where this same horse was sold for a hundred thousand dollars in sound condition, but may actually have been lame. Chris —

Chris Halsne: That's right, Jenifer. The new buyer of This Lady Sings says he paid top dollar for the two-year-old mare because he was assured the horse was perfectly healthy. This civil suit claims the horse suffers from some long-term health problems that make it nearly worthless.

This Lady Sings trotted perfectly in the ring and carried away an impressive title. What judges didn't know was a few days before the world show this Bristow, Oklahoma, vet injected the horse with an undetectable painkiller called Sarapin.

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You've never so-called doctored a horse before competition so that it competed not on its own? Have you ever done that?

Dr. Mitchell: A lot of times I don't know when a horse is competing when I'm treating the horse, but I never use anything illegally.

Chris Halsne: Dr. H.L. Mitchell is now a key witness in a civil lawsuit. The federal case says Mitchell knew that This Lady Sings was hobbling before the world show. Afterwards, he examined the horse for a new buyer and didn't disclose the mare's previous injury.

Dr. Mitchell: Now, I don't know if I should be talking on television about this.

Chris Halsne: Mitchell says ethical rules of doctor-client privilege required his silence. During the quarter horse championships, This Lady Sings was owned by T.J. Offutt of T-Bar-E Stables. The lawsuit alleges he and his trainer failed to disclose the mare had been treated in such a manner as to disguise her lame condition. Offutt's attorney says the whole affair is over bitter grapes, and if the horse is now hurt, it was injured after the sale.

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Jeff Alexander: They're always busy chewing on something or doing something.

Chris Halsne: The mare's new trainer says Offutt and his vet should have been more honest about the champion's condition.

Jeff Alexander: They won the world, they got the trophy and the belt buckle, sold the mare and got a big check and it's over so they just — they don't care anymore after that. They move on to the next one.

Chris Halsne: Dr. Mitchell claims the horse was badly shod when it came to the world championships, and he simply treated a bruise. The new buyer says the horse's health condition is chronic. Until a court decides, This Lady Sings will be sidelined to a less than glorious existence, out of the spotlight and in a heated stall.

We did hear from the American Quarter Horse Association and the Oklahoma Racing Commission today about our report on This Lady Sings. Both organizations have now opened investigations regarding possible rules violations. Our investigative team will continue to stay on top of this story and bring you all the new information as we confirm it. Jenifer —

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Jenifer Reynolds: All right, Chris. We'll look forward to that. Thank you.

FEBRUARY 4, 1998

Announcer: You'll be appalled by what racing officials say this vet has done. The Investigators expose his track record.

Chris Halsne: Should he be banned from racing in Oklahoma? The Investigators find out.

Announcer: "Track Record." Thursday at 10:00 on News Nine.

FEBRUARY 5, 1998

Announcer: You'll be appalled by what racing officials say this vet has done. The Investigators expose his track record.

Chris Halsne: Should he be banned from racing in Oklahoma? The Investigators find out.

Announcer: "Track Record." Tonight at 10:00 on News Nine.

5:00 p.m. newscast

Robin Marsh: A connection between the death of a high-priced race horse . . and the alleged doping of a champion quarter horse . .

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Kelly Ogle: That's the focus of a News Nine Investigation tonight at 10 o'clock. The link? Dr. Howard L. Mitchell of Bristow, Oklahoma. Lead investigator Chris Halsne first reported on Mitchell several weeks ago. A federal lawsuit accuses the vet of doping up an amateur world champion quarter horse. We now have new information about Dr. Mitchell's past . . that may get him kicked out of racing in Oklahoma.

Chris Halsne: If you as an investigator went out to one of your tracks and saw Dr. Mitchell in the barns, what would you do?

Wayne Conwell: I would have him removed.

Kelly Ogle: News Nine travels to New Mexico . . to ask questions about Dr. Mitchell's involvement in the death of a high-priced colt. Watch "Track Record" tonight at ten.

Announcer: Plus, the Investigators. You'll be appalled by what racing officials say this vet has done. The Investigators expose his track record. That's tonight at 10:00. News Nine, working in the spirit of Oklahoma.

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Jenifer Reynolds: Moving on to some other news, an Oklahoma veterinarian is the target of a News Nine investigation tonight. Not only is he accused in a federal lawsuit of giving a world-class quarter horse painkillers before a show here, he's also suspected of killing one of the country's top racehorses.

Here's the vet we're talking about. His name is Dr. Howard L. Mitchell of Bristow, Oklahoma. Lead investigator, Chris Halsne, has discovered that Dr. Mitchell has a troublesome past that might get Mitchell banned from racetracks here in Oklahoma. Chris —

Chris Halsne: That's right, Jenifer. I found out that Dr. Mitchell's already banned from racing in New Mexico. Now, we first told you about Mitchell last month. The American Quarter Horse Association is still investigating whether he improperly doped a mare named This Lady Sings before the Quarter Horse World Championships here in Oklahoma City last November. The Investigators found out this incident isn't the first time Mitchell has been in trouble for his veterinary practices.

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Doo Dominate bolted out of Gate 9 during the 1994 All-American Futurity at Ruidoso Downs. One hundred yards from the finish, the powerful colt stumbled, broke both legs, and had to be euthanized. The New Mexico Racing Commission conducted an extensive investigation. An exam afterward showed Doo Dominate competed doped up and with a broken knee.

Wayne Conwell: The horse was injured to the extent that it should not have run the race.

Chris Halsne: Agent Wayne Conwell also found that a Bristow, Oklahoma, vet known around the barns as Dr. Fix-it had been illegally working on the colt prior to the race. Dr. Fix-It turned out to be Dr. Howard L. Mitchell. New Mexico nailed him with practicing veterinary medicine without a license and permanently revoked his racing permit.

Wayne Conwell: He's not allowed into the security areas of the racetrack. He's not allowed to be taking care of any kind of business involving the racing of horses in the state of New Mexico.

Chris Halsne: Public records of the case show Mitchell was practicing some pretty uncon-

ventional vet techniques on injured horses, including implanting little beads of gold to help a stallion recover from surgery, injecting super glue in a horse's broken leg, electrical acupuncture, magnetic blanket treatments, and laser therapy.

Dr. Joe Carter is an equine vet and the president of the Oklahoma Veterinary Medicine Association. He's wary of alternative treatments.

Dr. Joe Carter: You know, they end up wasting a lot of time, a lot of money, and they end up, you know, with a horse that's still got a chronic problem. It's not curable. They end up turning them out to pasture.

Chris Halsne: Just because Mitchell can't set foot on any racetrack in New Mexico ever again, does that mean he should be banned from racetracks in Oklahoma? Well, the Oklahoma Racing Commission says yes. Its rules say, "Banned in one state, you're banned in ours." So why does Mitchell have a license to be on tracks in Oklahoma? It appears he just lied on his application.

Here's the clause we're talking about. Question No. 13, he marked "no" when asked if he's ever had his license revoked.

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Benny Lovett: We think there's a good possibility he may have falsified that application.

Chris Halsne: If Mitchell does lose his racing permit, working his magic on high-bred horses will be more difficult than ever. The Oklahoma Racing Commission tells me that they could hear Mitchell's case as soon as two weeks, but they tell me late March is more likely. Jenifer —

Jenifer Reynolds: Well, Chris, you checked and Dr. Mitchell does have a veterinary license in good standing at this point.

Chris Halsne: That's correct. It is in good standing, but I'm told by sources at the vet board that it does have an active investigation right now regarding Dr. Mitchell.

Jenifer Reynolds: And I know you'll keep us posted on that. Chris Halsne, thank you.

MARCH 26, 1998

Announcer: Tonight at 10 on News Nine, an Investigators' follow up.

Chris Halsne: Our reports have already told you about this veterinarian's track record — the Oklahoma Racing Commission takes action.

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10:00 p.m. newscast

Jenifer Reynolds: Another Investigators follow up, now on an Oklahoma veterinarian accused of helping kill one of this country's top racehorses. Dr. H.L. Mitchell of Bristow is now effectively banned from every racetrack in the state of Oklahoma. A few months ago a News Nine investigation showed how Mitchell was connected to the doping of a world-class racehorse and a world champion show horse.

Lead investigative reporter, Chris Halsne, tells us tonight the vet is no longer welcome in the barns at Remington or any other track in Oklahoma. And, Chris, the racing commission has taken action against Dr. Mitchell's license.

Chris Ralsne: They sure have, Jenifer. The racing commission rescinded Dr. Mitchell's license and doesn't plan on giving it back ever. While we were investigating Mitchell's role in the death of a horse named Doo Dominate seen here, we discovered Mitchell had lied on his Oklahoma racing permit application. The Bristow vet was permanently banned from racetracks in New Mexico

several years ago. He failed to disclose that fact to the Oklahoma Racing Commission and its officials as required.

According to public records, racing commission stewards recently accepted a plea of no contest from Mitchell for falsifying an application. The commission fined the doctor $300 and banned him from tracks here in Oklahoma.

Mel Webb: It was found that he was in violation of that rule, that he had falsified his '97 owners application when he answered no to the question.

Chris Halnse: And why is that a big deal? Why should, why should the stewards be concerned with that kind of thing?

Met Webb: Well, that's part of the integrity of horse racing. We want people to tell the truth when we ask those questions on the application.

Chris Halsne: I did call Dr. Mitchell for a comment today, but instead his Tulsa attorney just faxed me this statement. In part it says Dr. Mitchell has no desire to speak with me and has no comment to make. Jenifer —

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Jenifer Reynolds: Chris, you do also have an update for us on an ongoing investigation by the Oklahoma Veterinary Board.

Chris Halsne: That body is investigating a similar complaint about Dr. Mitchell, that he failed to tell the vet board about his ban from racing in New Mexico and what led to that. We'll update you as that inquiry progresses.

Jenifer Reynolds: We'll look forward to your next follow-up. Chris, thank you.

JUNE 15, 1998

Angela Buckelew: The state Veterinarian Board has accused a local vet of fraud, negligence, and conflict of interest following a News Nine investigation into a horse doping scandal.

Here's the vet we're talking about . . Dr. Howard L. Mitchell of Bristow. The vet board says Mitchell injected a world class quarter horse with a painkiller to help mask pain . . then failed to tell the person buying the horse about the alleged injury.

We'll have more details in a report airing at ten o'clock tonight on News Nine.

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JUNE 17, 1998

Announcer: Plus, the Investigators. We told you about the wrongdoings of this Oklahoma vet, now the state veterinarian board takes official actions. "Track Record." That's tonight at 10:00. News Nine, working in the spirit of Oklahoma.

10:00 p.m. newscast

Kelly Ogle: An Oklahoma veterinarian accused of doping-up some of this country's top show and race horses . . . faces state disciplinary action.

The Investigators first told you about Dr. Howard L. Mitchell earlier this year. We found that Mitchell injected an undetectable painkiller into a horse named This Lady Sings prior to the world Quarterhorse Championships in Oklahoma City last fall. That mare won . . . and was sold for top dollar.

Lead Investigative Reporter Chris Halsne looks at still more allegations that Dr. Mitchell intentionally masked the horses lameness . . to help make that sale.

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Chris Halsne: Here's a recent complaint filed by the State Board of Veterinary examiners . . charging Dr. Mitchell with, among other things, fraud, negligence, and conflict of interest.

This Lady Sings left the world quarter-horse show . . with a blue ribbon around her neck. That beautiful, championship gait made her instantly worth 100-thousand dollars to a new buyer. Her step may not have been real however. This vet board complaint says Dr. Howard Mitchell of Bristow "disguised the mare's condition of lameness" by administering painkiller to the horse's leg prior to the show. Mitchell's attorney won't let us talk to him any longer . . but here's what the vet said earlier this year about the incident.

You gave the horse a painkiller. A vegetable-based painkiller?

Dr. Mitchell: When she first got there.

Chris Halsne: Ron Skoda . . . seen here at the world show . . was the guy who purchased This Lady Sings after her stellar performance. Dr. Mitchell didn't tell him about any injection . . or possible injury to the horse's leg . . even though Ron Skoda

actually hired Mitchell and paid him to examine the horse for soundness . . before he laid down his money.

Working for both the seller . . and the buyer.. has put Mitchell in some hot water with the vet board. They are accusing him of "conflicting interest" . . saying "acceptance of a fee from both the buyer and seller is prima facie evidence of fraud." Mitchell defends his silence.

Dr. Mitchell: I think I was bound by client privilege . . when I examined the horse I was obligated to the man that I was working for at that time . .

Chris Halsne: This Lady Sings new owners say Mitchell had a responsibility to tell them about this mares previous injury . . If he had, they say they never would have spent six-figures on a horse with foot problems.

Those owners have filed a federal lawsuit to try to recoup their losses . . but Dr. Mitchell is not named as a party in the lawsuit . . . just a witness.

Kelly Ogle: Chris, the Oklahoma vet board also says Mitchell lied on his licensing application.

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Chris Halsne: We found out Mitchell was caught practicing veterinary medicine without a license in New Mexico. He's banned from racetracks in New Mexico for life following the death of a horse . . which competed doped up. Now the vet board here says Mitchell had to tell them about that . . . and didn't.

Kelly Ogle: Dr. Mitchell has formally denied all wrongdoing. His disciplinary hearing is slated before the full vet board September 11th.

SEPTEMBER 12, 1998

Alex Cameron: Thanks for joining us. I'm Alex Cameron.

Amy Hawley: And. I'm Amy Hawley.

News Nine Investigators first told you about Doctor Howard L. Mitchell of Bristow earlier this year. We discovered Mitchell was in some trouble in New Mexico following the death of a high-priced race horse . . Doo Dominate is seen here fatally falling during the All American Futurity in 1994.

Alex Cameron: That story . . caught the attention of the Oklahoma Veterinary Board . . which today put Dr. Mitchell's license on probation.

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Lead Investigative Reporter Chris Halsne joins us live with the latest . . Chris, the vet board just made a decision.

Chris Halsne: After listening to testimony all day long . . The board rendered it's verdict about 8 tonight. Dr. Howard Mitchell can keep his Vet license . . but is on 2 years probation. The board found him guilty of conduct likely to deceive, defraud, or harm the public . . . and fraud or misrepresentation in applying for a license. Tonight, we bring you an Inves-tigators update.

Dr. Mitchell: I thought we weren't rehashing that . . I mean, you know, tell me what does that have to do with anything . .

Chris Halsne: Dr. Howard Mitchell's career as a equine veterinarian . . and animal acupuncturist . . continues . . but under supervision . . and a host of new rules. News Nine was the first to tell you, Mitchell's racing permit was permanently revoked in New Mexico in 1995. The vet had flown down to New Mexico to perform "alternative" treatments, like acupuncture, on a horse called Doo Dominate just prior to the All American Futurity. Doo Dominate raced . . fell and had to be euthanized. Tests afterward showed the

horse began the race with a broken knee. Mitchell claims this event was another veterinarian's fault.

Dr. Mitchell: When all of this stuff hit Dr. Story decided he didn't want to testify . . or state that I was consulting with him . . so really I got stuck out there on a limb and they sawed it off behind me.

Chris Halsne: The New Mexico Racing Commission didn't believe that . . and banned him from it's tracks. The Oklahoma vet board says Mitchell was required to reveal his racing revocation in New Mexico on his license reapplication here . . and he didn't. As part of Mitchell's probation . . the board now wants to know every time Mitchell leaves the state to work on horses.

When Mitchell does vet work in another state . . the board also wants proof that Mitchell has permission to practice in that state. New Mexico authorities say Mitchell did not have permission to practice veterinary medicine in their state when Doo Dominate died.

Alex Cameron: Chris, Dr. Mitchell will also be required to pay the costs of the vet board investigation.

Chris Halsne: And he is being asked to re-take part of his veterinary licensing exam.

Alex Cameron: Chris, thank you. If you have a question or something you'd like the Investigators to check out call out hotline at 841-9921.

SEPTEMBER 13, 1998

Shon Gables: Topping news this half hour on News Nine this morning. An Oklahoma veterinarian accused of helping kill one of this county's top race horses has been punished by the vet board.

News Nine Investigators first told you about Dr. Howard L. Mitchell of Bristow earlier this year. We discovered Mitchell was in trouble in New Mexico following the death of a high-priced race horse . . Doo Dominate is seen here fatally falling during the All American Futurity in 1994.

That story . . caught the attention of the Oklahoma Veterinary Board. About eight o'clock last night the board rendered it's verdict. Dr. Howard Mitchell CAN keep his vet license . . but is on two years probation. The board found him guilty of conduct likely to deceive, defraud, or harm the public . . and fraud

or misrepresentation in applying for a license. News Nine lead investigator Chris Halsne has the story.

Dr. Mitchell: I thought we weren't rehashing that . . I mean, you know, tell me what does that have to do with anything . .

Chris Halsne: Dr. Howard Mitchell's career as a equine veterinarian . . and animal acupuncturist . . continues . . but under supervision . . and a host of new rules. News Nine was the first to tell you, Mitchell's racing permit was permanently revoked in New Mexico in 1995. The vet had flown down to New Mexico to perform "alternative" treatments, like acupuncture, on a horse called Doo Dominate just prior to the All American Futurity. Doo Dominate raced . . fell and had to be euthanized. Tests afterward showed the horse began the race with a broken knee. Mitchell claims this event was another veterinarian's fault.

Dr. Mitchell: When all of this stuff hit Dr. Story decided he didn't want to testify . . or state that I was consulting with him . . so really I got stuck out there on a limb and they sawed it off behind me.

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Chris Halsne: The New Mexico Racing Commission didn't believe that and banned him from it's tracks. The Oklahoma vet board says Mitchell was required to reveal his racing revocation in New Mexico on his license reapplication here . . and he didn't. As part of Mitchell's probation . . the board now wants to know every time Mitchell leaves the state to work on horses.

Chris Halsne, News Nine.

Shon Gables: New Mexico authorities say Mitchell did not have permission to practice veterinary medicine in their state when Doo Dominate died. We want to remind you that if you have a question on something you'd like the Investigators to check out call our hotline at 841-9921.

APPENDIX H — JURY INSTRUCTIONS

IN THE DISTRICT COURT OF CREEK COUNTY
STATE OF OKLAHOMA
BRISTOW DIVISION

Case No. CJ-99-16-B
(Judge Joe Sam Vassar)

H. L. MITCHELL, D.V.M., an individual,

Plaintiff,

vs.

GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation, and CHRIS HALSNE, an individual,

Defendants.

JURY INSTRUCTIONS

INSTRUCTION NO. 1

The parties to this case are Dr. H. L. Mitchell, the Plaintiff, and Chris Halsne and Channel 9, the Defendants. The parties agree that between January 26 and September 13, 1998, KWTV broadcast several news reports concerning Plaintiff.

Dr. Mitchell claims that the stories were false and defamatory and that the stories caused injury to himself and to his business. He alleges that Defendants were negligent in broadcasting the stories. Dr. Mitchell further alleges that

the publication was a deliberate or reckless falsity. In order to prove this, Plaintiff will have to prove, at the minimum, that Defendants made a false publication with a high degree of awareness of probable falsity or must have entertained serious doubts as to the truth of the publication.

Dr. Mitchell also claims that the stories the Defendants broadcast placed Dr. Mitchell in a false light. That is, the stories gave the public a false impression of Dr. Mitchell.

The statements which Dr. Mitchell claims are actionable are:

In the January 26, 10:00 p.m. broadcast:

(1) This Lady Sings was hobbling before the World Championships . . and was given a painkiller.

(2) What he did was *put a chemical called Sarapin in her foot* to mask the pain.

In the Jan. 27, 1998, 5:00 p.m. broadcast:

(3) . . . digs deeper into, allegations that a top show horse was drugged during the World Quarter Horse Championships.

In the Jan. 27, 1998, 10:00 p.m. broadcast:

(4) The federal case says Mitchell knew that This Lady Sings was hobbling before the world show.

Appendix H

In the Feb. 5, 1998, 5:00 p.m. broadcast:

(5) A connection between the death of a high-priced race horse . . and the alleged doping of a champion quarter horse.

In the Feb. 5, 1998, 10:00 p.m. broadcast:

(6) Not only is he accused in a federal lawsuit of giving a world-class quarter horse painkillers before a show here, he's also suspected of killing one of the country's top racehorses.

(7) An exam afterward showed Doo Dominate competed doped up and with a broken knee.

In the Mar. 26, 1998, 10:00 p.m. broadcast:

(8) . . . an Oklahoma veterinarian accused of helping kill one of this country's top racehorses.

(9) . . . investigation showed how Mitchell was *connected to the doping of a world-class racehorse and a world champion show horse.*

In the June 17, 1998, 10:00 p.m. broadcast:

(10) An Oklahoma veterinarian, accused of doping-up some of this country's top show and race horses . . . faces state disciplinary action.

Appendix H

In the Sept. 12, 1998, 10:00 p.m. broadcast:

(11) Tests afterward showed the horse began the race with a broken knee. Mitchell claims this event was another veterinarian's fault.

In the Sept. 13, 1998, 10:00 p.m. broadcast:

(12) An Oklahoma veterinarian accused of helping kill one of this county's top race horses has been punished by the vet board.

Chris Halsne and Channel 9 claim that the investigative reports were true and did not constitute defamation. They further contend that they did not act with negligence or reckless disregard in broadcasting the stories about Dr. Mitchell. The Defendants contend that the stories they broadcast did not place Dr. Mitchell in a false light. The Defendants also contend the Plaintiff did not suffer damages for which they are legally responsible.

These are the issues you are to determine.

APPENDIX I — BRIEF OF APPELLANTS IN THE SUPREME COURT OF THE STATE OF OKLAHOMA DATED MARCH 18, 2002

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 96,640

H. L. MITCHELL, D.V.M.,

Plaintiff/Appellee

v.

GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation, and CHRIS HALSNE, an individual,

Defendants/Appellants

BRIEF OF APPELLANTS

* * *

Whether the evidence is sufficient to show actual malice is a question of law. *Herbert*; *Gaylord Entertainment Co. v. Thompson*, 1998 OK 30, 958 P.2d 128. At the trial level, the issue should not be submitted to a jury unless the court first determines there is clear and convincing evidence. *See, e.g., Herbert*, 1999 OK 90, ¶ 18, 992 P.2d at 328 ("clear and convincing" test applied on summary judgment); *Hart v. Blalock*, 1997 OK 8, 932 P.2d 1124 (demurrer to evidence properly sustained). At this level, "an appellate court

has an obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *Herbert*, 1999 OK 90, ¶ 18, 992 P.2d at 328.

* * * *

APPENDIX J — REPLY BRIEF OF APPELLANTS IN THE SUPREME COURT OF THE STATE OF OKLAHOMA DATED MAY 20, 2002

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 96,640

H. L. MITCHELL,

Plaintiff/Appellee,

v.

GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation, and CHRIS HALSNE, an individual,

Defendants/Appellants.

REPLY BRIEF OF APPELLANTS

* * *

I. The plaintiff did not prove actual malice clearly and convincingly.

Proof of actual malice must be clear and convincing. *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964); *Herbert v. Oklahoma Christian Coalition, Inc.*, 1999 OK 90, ¶¶ 16, 18; 992 P.2d 322, 328. Whether the record is sufficient to show actual malice is a question of law. *Harte-Hanks*

Communications, Inc. v. Connaughton, 491 U.S. 657, 685 (1989); *Herbert*, 1999 OK 90, ¶ 18, 992 P.2d at 328; *Gaylord Entertainment Co. v. Thompson*, 1998 OK 30, 958 P.2d 128. "[A]n appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *Herbert*, 1999 OK 90, ¶ 18, 992 P.2d at 328. *Accord*: *Harte-Hanks*, 491 U.S. at 688 ("[T]he reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect[.]'") (citations omitted). Mitchell did not, as a matter of law, prove actual malice clearly and convincingly.

* * *

KWTV's characterization of Mitchell's role in the death of Doo Dominate is a rational interpretation of ambiguous events, and reckless disregard of the truth cannot be inferred because the publisher proposes an interpretation of events different from that favored by the plaintiff. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519 (1991) ("The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources."); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984) (no reckless disregard where report was but "'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive

challenges for the writer."); *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971) ("The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under *New York Times.*").[17]

* * * *

17. This proposition is supported by a case cited by the plaintiff (Pl. Brief at 15), *Costello v. Ocean County Observer*, 136 N.J. 594, 643 A.2d 1012 (1994), in which the court, affirming summary judgment for the defendant despite the plaintiff's argument that the reporter should have looked more thoroughly at documents the plaintiff claimed contradicted the published report, held that "[a] plaintiff must demonstrate more than an erroneous interpretation of the facts to demonstrate actual malice." *Id.* at 1025. *See also Henslee v. Monks*, 1977 OK 202, 571 P.2d 440 (in reporting accusations that police chief had possibly obstructed justice by agreeing with ranchers to allow them to hire illegal aliens, reporter's failure to understand legal distinctions between hiring and harboring aliens was not reckless disregard).

APPENDIX K — APPELLANTS' PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA DATED AND FILED SEPTEMBER 26, 2002

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Supreme Court Case No. 96640

H. L. MITCHELL, D.V.M.,

Plaintiff/Appellee,

v.

GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation, and CHRIS HALSNE, an individual,

Defendants/Appellants.

APPELLANTS' PETITION FOR CERTIORARI

* * *

II. ***Outline of Reasons for Review.***

A. The COCA applied the incorrect standard of review, in violation of decisions of this Court, the United States Supreme Court, and Appellants' rights under U.S. Const. amend. I. The COCA unconstitutionally applied a deferential standard of review used in common law civil actions to find that there was some competent evidence to support the verdict rather than conducting the independent examination of the

entire record that is constitutionally required in First Amendment cases. If the correct standard of review is applied, the judgment cannot be sustained. S.Ct. Rule 1.178(a)(2) and (4).

* * *

IV. ***Arguments in Support of Reasons for Review.***

A. Standard of Review. Certiorari should be granted because the COCA's for-publication opinion sets forth the incorrect standard of review for First Amendment cases. The COCA stated that the jury verdict must be affirmed if there is any competent evidence to support the verdict. Opinion at 6. That standard of review violates the First Amendment. "[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984), quoting *New York Times Co. v. Sullivan, 376 U.S. 254, 284-286 (1964)*; *Herbert v. Oklahoma Christian Coalition*, 1999 OK 90, 992 P.2d 322, 328 (as expositors of the Constitution, judges have a duty to independently decide whether the evidence is sufficient to cross the constitutional threshold). The rule "assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact." *Bose*, 466 U.S. at 501.

An independent review of the record in this case shows that the requisite *New York Times* actual malice did not exist. Proof of actual malice necessary to support Mitchell's

defamation and false light invasion of privacy claims requires clear and convincing evidence that Appellants acted with subjective knowledge of the falsity of the alleged defamatory statement or with reckless disregard, defined as actions taken with "serious doubts" of truth or "a high degree of awareness of . . . probable falsity." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1980); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); St. *Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Herbert*, 992 P.2d at 328. *See also Jurkowski v. Crawley*, 1981 OK 110, 637 P.2d 56, 61("actual awareness of probable falsity").[1] Malice may not be inferred from a showing that the publication was untrue. *Bose*, 466 U.S. at 498, 512; *Herbert*, 992 P.2d at 328.

An independent review of the entire record clearly reveals that there was no evidence, let alone that which was clear and convincing, that Appellants knew the information to be false or that they in fact entertained serious doubts as to its truth. With respect to This Lady Sings, the COCA concluded only that Appellants did not accurately report what was alleged in the federal court complaint and that this conduct constituted actual malice because Halsne had read the complaint before broadcasting his initial reports in January 1998. The COCA failed to conduct an independent review of the entire record as is constitutionally required. Rather, it reviewed only evidence which it considered to

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1. With respect to KWTV, in order to prove malice, Mitchell was required to "show that the state of mind required was brought home to the persons in [KWTV's] organization having responsibility for the publication of the alleged" defamatory statements. *Miskovsky v. Oklahoma Pub.* Co., 1982 OK 8, 654 P.2d 587, 591 (citing *New York Times v. Sullivan, supra).*

support the verdict. The COCA ignored the uncontroverted evidence that Appellants accurately reported what Skoda claimed in the federal case based not just on the language of the complaint but also on information obtained from Skoda, his trainer, and his counsel. The reports were not only about what was claimed in the federal *case*, but the uncontroverted fact that Mitchell had given Sarapin to This Lady Sings under circumstances which might have affected the horse's performance in the World Championship. The evidence does not support any finding that Appellants knew what was reported was false, or that they acted with reckless disregard of the truth.[2]

With respect to Doo Dominate, the COCA concluded that Appellants had falsely reported that the NMHRC found Doo Dominate raced doped up and Mitchell was linked with the doping.[3] That is not what Appellants reported. They said, accurately, that "An exam afterward showed Doo Dominate competed doped up and with a broken knee." The official spokesperson for the NMHRC told Halsne the outcome of the NMHRC investigation and his statements were supported

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2. The COCA, as did Mitchell, quibbles with Appellants' use of the word "hobbling" to describe the condition of This Lady Sings when he administered Sarapin. However, Mitchell himself used the terms "limping," "hobbling," or "being ginger" as the equivalent of the word "lame." Moreover, the choice of the word "hobbling," even if a malapropism, is not evidence of actual malice. *See Bose*, 466 U.S. at 490, 513.

3. The COCA incorrectly interpreted KWTV's February 5, 1998 report, and inferred Halsne's actual malice, from the lead-in (not written by Halsne) to another report about Mitchell broadcast nearly two months later. Opinion at 14.

by documentary evidence and witness' statements contained in the NMHRC files. The COCA found that evidence of actual malice existed because Halsne reviewed the NMHRC's order relating to Mitchell,[4] and Halsne was aware of the NMHRC's dismissal of its complaint against Doo Dominate's owner and trainer. By failing to conduct an independent review of the entire record, the COCA did not take into account that all these facts and circumstances were fully investigated by Appellants and explained to Halsne's satisfaction, prior to the broadcasts, by Conwell. Conwell's testimony at trial that Appellants' broadcasts accurately stated what he had told Appellants, and which are borne out by the other evidence revealed in Appellants' investigation, precludes any finding that Appellants knew that any statement made by them was false, or that they acted in reckless disregard of the truth.

Appellants conducted an extensive investigation, which several expert witnesses at trial testified exceeded journalistic standards. Nevertheless, even a failure to conduct an investigation or an adequate investigation does not support a finding of malice. *St. Amant*, 390 U.S. at 730; *Herbert*, 992 P.2d at 328-329; *Jurkowski v. Crawley*, 1981 OK 110, 637 P.2d 56, 60-62. No actual malice exists if the publisher "acted on a reasonable belief that the defamatory material was substantially correct and there was no evidence to impeach the publisher's good faith." *Herbert*, 992 P.2d

4. While the NMHRC Order ended the New Mexico disciplinary proceedings against Mitchell, it did not purport to answer all the questions raised by the investigation. *See Street v. National Broadcasting Co.*, 645 F.2d 1227, 1233 (6th Cir. 1981) ("Judicial proceedings resolve disputes, but they do not establish the truth for all time.").

at 329. Moreover, where a publisher's report is a rational interpretation of the events, reckless disregard of the truth cannot be inferred because its interpretation differed from that favored by the plaintiff. *Masson, 501 U.S.* at 519 ("The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources.").[5]

The COCA also violated its obligation to conduct an independent review of the record to determine whether each of the 12 statements submitted to the jury, which were made in several different reports over several month's time, was independently actionable. Instead, the COCA considered all of the news reports as a whole to have a single, grossly oversimplified meaning. Opinion at 20. The COCA relied on its prior analysis under the deferential standard of review to find this simplified meaning to be defamatory, not privileged, and libelous *per se*. The issues of whether speech is protected, whether each statement bears the meaning ascribed to it by the plaintiff, and whether that statement, in context, is defamatory, are questions of law for the court. *Bose*, 466 U.S. at 505; *Gaylord Entertainment Co. v. Thompson*, 1998 OK 30, 958 P.2d 128; *Sellers v. Oklahoma Pub. Co.*, 1984 OK 11, 687 P.2d 116.

* * * *

5. *See also Bose, supra*, 466 U.S. at 512 (no reckless disregard where report was but "'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer."); Time, *Inc. v. Pape*, 401 U.S. 279, 290 (1971) ("The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under *New York Times.*")

(2)

Supreme Court, U.S.
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No. 02-1287

In The
Supreme Court of the United States

GRIFFIN TELEVISON OKC, L.L.C., and
CHRIS HALSNE,

Petitioners,

v.

H.L. MITCHELL, D.V.M.,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Civil Appeals
Of The State Of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners ask this Court to grant certiorari to review three questions concerning the Oklahoma Court of Civil Appeals' actual malice determination, asserting that these issues are dispositive of this case. Petitioners are simply wrong. In a private figure defamation action such as this, proof of actual malice is necessary only to permit an award of presumed or punitive damages. The Oklahoma Court of Appeals has already held, however, on state law grounds, that presumed damages are not permitted in this case, and it is unclear whether the jury's relatively modest award of punitive damages will be reinstated or vacated on remand. Thus the questions proposed by Petitioners are not only not dispositive of this litigation, they are largely moot. For these and other reasons discussed below, the Petition for a Writ of Certiorari should be denied.

STATEMENT OF THE CASE

In 1998, Petitioners Chris Halsne ("Halsne") and Griffin Television, L.L.C. ("KWTV"), published a series of seven television broadcasts regarding Respondent Howard L. Mitchell ("Mitchell"), a Bristow, Oklahoma, veterinarian. The facts surrounding these broadcasts were established below and are as follows:[1]

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[1] KWTV's Petition sets forth numerous facts which contradict the factual findings made (implicitly) by the jury and (explicitly) by the Oklahoma Court of Civil Appeals. This Court has indicated, however, that regardless of the heightened standard of review for the question of actual malice, the jury's underlying credibility assessments and factual determinations are still subject to a clearly-erroneous standard of review. *See, infra* pp. 22-23. Petitioners have at no point alleged or demonstrated that the factual determinations of the jury or the Court of

(Continued on following page)

KWTV's first series of broadcasts regarding Mitchell concerned his treatment of a halter horse named This Lady Sings. Mitchell testified that he examined This Lady Sings at the AQHA World Championships because she was "a little tender on her right front foot" and found that she had twisted her shoe. *Mitchell v. Griffin Television, L.L.C.*, 2002 OK CIV APP 115, ¶ 9, 60 P.3d 1058.[2] Mitchell told the trainer that the horse needed a farrier. When the trainer was unable to locate a farrier that night, Mitchell testified that he gave the horse a "minute amount" of a natural blocking agent called Sarapin, which wears off in 24 to 36 hours, to relieve her discomfort. *Id.* This Lady Sings was sold after the show, and subsequently her purchasers sued the sellers in federal court, alleging that the horse was unsound at the time of sale and that her trainer had deliberately concealed the horse's lame condition. *Id.* at ¶ 10.

KWTV ran several broadcasts describing Mitchell's role in this dispute and the transcripts of these broadcasts are reproduced in the Appendix to Petitioners' brief. In the lead-in to the first story, which aired on January 26, 1998, KWTV announced that Halsne was investigating "[a]llegations of cheating and drug use at the World Quarter Horse Championships." PETITIONERS' APP. at 35a. In his report, Halsne described This Lady Sings as a

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Civil Appeals are clearly erroneous. Therefore, the appellate court's recitation of facts should govern this Court's analysis.

[2] The official opinion of the Oklahoma Court of Civil Appeals, as filed with the clerk of the Oklahoma Court of Civil Appeals and as reported on the Oklahoma Supreme Court website and in the official reporter, contains numbered paragraphs. The copy of the opinion included in Petitioners' Appendix omits the paragraph numbers. An official copy of the opinion is therefore included in Respondent's Appendix at App. 1-22.

"casualty" of the "big money" quarter horse industry. *Id.* at 36a. Halsne then stated that "[t]here is a dark secret to this horse's injury . . one the American Quarter Horse Association has under investigation. This Lady Sings was hobbling before the World Championships . . and was given a painkiller." *Id.* at 36a-37a. Halsne then stated that Mitchell "put a chemical called Sarapin in [the mare's] foot *to mask the pain*." *Id.* at 37a (emphasis added). Clearly, the suggestion was that Mitchell intended the Sarapin to conceal the horse's pain from others, not to relieve the horse's discomfort. Because Halsne tied Mitchell's administration of the pain killer to allegations of "cheating," he further sent viewers the message that Mitchell was deliberately injecting the horse with a drug, not for medical purposes, but to give it an unfair advantage in the competition.

At the close of the first broadcast, Halsne indicated that he would present a report the next night about a lawsuit relating to the horse's injury, and promised "[t]here is a lot more to this story." *Id.* at 38a. On January 27, 1998, KWTV promoted this story by stating that its investigative team was "dig[ging] deeper into allegations that a top show horse was *drugged* during the World Quarter Horse Championships." *Id.* at 39a (emphasis added). Another promotional tape featured an announcer stating, "An Oklahoma vet linked in a federal lawsuit to masking the injuries of a champion show horse." *Id.* at 40a.

During that broadcast, Halsne reported that "[t]he federal case says Mitchell knew that This Lady Sings was hobbling before the world show. Afterwards, he examined the horse for a new buyer and didn't disclose the mare's previous injury." *Id.* at 42a. KWTV then inserted a soundbite of Mitchell stating, "I don't know if I should be talking

on television about this." *Id.* at 42a. This broadcast deliberately conveyed to viewers that *Mitchell* was the alleged wrongdoer in the federal lawsuit and that he had something to hide. Any doubt that this was the message KWTV intended to convey was erased one week later when a KWTV anchor stated plainly that, "[a] federal lawsuit accuses the vet of doping up an amateur world champion quarter horse." *Id.* at 45a.

At trial, Halsne testified that he was familiar with the complaint filed in the federal lawsuit and had it in his possession prior to airing the story. *Mitchell*, 2002 OK CIV APP 115, ¶ 11. As the jury and Court of Appeals found, however, the role of Mitchell in the federal lawsuit complaint bore little resemblance to Halsne's description. The complaint did not allege that Mitchell knew the horse was hobbling before the show. *Id.* at ¶ 12. While the complaint accused the *trainer* of acting with the purpose of disguising, or masking, the horse's lame condition, it did not allege *Mitchell* acted with that purpose. *Id.* Nor did the complaint accuse Mitchell of concealing the horse's condition when he conducted the pre-purchase exam; rather it alleged the horse's condition was concealed *from* Mitchell by the silicone pads in the mare's hoof. *Id.* Halsne's statements thus did not truly and fairly report the allegations in the complaint. *Id.* at ¶ 13.

As it was running these stories, KWTV received a "tip" about Mitchell, relating to a horse named Doo Dominate and proceedings with the New Mexico State Racing Commission ("NMSRC") seven years earlier. Mitchell treated Doo Dominate prior to the 1994 All American Futurity race at Ruidoso Downs in New Mexico.[3]

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[3] Mitchell treated Doo Dominate for septic arthritis in his foreleg from August 31st to September 3rd, prior to the September 5, 1994,

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Id. at ¶ 14. During the race, the horse stumbled and broke both front legs. *Id.* Track veterinarians euthanized the horse, took blood and urine samples, and removed the front legs for necropsy. *Id.* Two other horses broke down and were euthanized that day.[4] *Id.*

Wayne Conwell, the Medication Manager for the NMSRC investigated Doo Dominate's breakdown. *Id.* at ¶ 15. Conwell sent the samples for testing and the legs for necropsy. *Id.* The necropsy of Doo Dominate revealed chronic arthritis in the front legs (which the reviewing veterinarian found serious enough to render the horse unfit for racing), as well as hairline fractures. *Id.* While the original urine sample tested positive for traces of mepivacaine, a pain-killer that was prohibited at that time,[5] a second test at an independent lab failed to confirm the presence of this drug. *Id.*

The NMSRC issued a Notice of Contemplated Commission Action against Mitchell, charging him with practicing veterinary medicine in New Mexico without a license[6] and with assisting Doo Dominate's owner and

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race. Mitchell never administered mepivacaine or any other painkiller to the horse.

[4] The attending veterinarian for Doo Dominate testified during the NMSRC investigation that there had been many complaints about holes on the race track causing horses to break down.

[5] Under a subsequent amendment to the NMSRC rules, a small amount of mepivacaine is not prohibited because it was found to have no impact on performance. *Id.* at ¶ 15 n.3.

[6] Mitchell was practicing under the supervision of a New Mexico veterinarian, which is permitted under New Mexico's general rules of veterinary practice. Mitchell was unaware, however, the general rules of veterinary practice do not apply on New Mexico racetracks, which are under the jurisdiction of the NMSRC. NMSRC rules do not permit supervised practice by out-of-state veterinarians on New Mexico racetracks.

trainer in running an unfit horse. *Id.* at ¶ 16. It did not charge Mitchell with giving the horse mepivacaine. *Id.* After a hearing, the NMSRC issued an order finding Mitchell practiced veterinary medicine without a license, and revoked his owner's license. *Id.* The NMSRC order specifically concluded the evidence was insufficient to prove Mitchell assisted the owner and trainer in running an unfit horse. *Id.* The NMSRC brought a separate action against the *owner and trainer* of Doo Dominate for the use of mepivacaine, but dismissed the charges because the results of the independent laboratory did not confirm the presence of mepivacaine in Doo Dominate's urine sample. *Id.* at ¶ 17.

Halsne obtained and was familiar with the NMSRC Notice and Final Order before airing his reports. *Id.* at ¶ 18. Nevertheless, on February 4 and 5, 1998, KWTV repeatedly aired a promotional tape promising viewers that "[y]ou'll be appalled by what racing officials say this vet has done." *Id.* at ¶ 19. In the 5:00 p.m. newscast on February 5th, a KWTV anchor promised that KWTV would show "[a] connection between the death of a high-priced race horse . . and the alleged doping of a champion quarter horse." PETITIONERS' APP. at 44a. In the 10:00 p.m. newscast, a KWTV anchor introduced Halsne's story, stating, "Not only is [Mitchell] accused in a federal lawsuit of giving a world-class quarter horse painkillers before a show here, he's also suspected of killing one of the country's top racehorses. . . . Lead investigator Chris Halsne has discovered that Dr. Mitchell has a troublesome past. . . . " *Id.* at 46a.

Halsne told viewers that the This Lady Sings incident "isn't the first time Mitchell has been in trouble for his veterinary practices." *Id.* at 46a. Halsne described Doo Dominate's breakdown and reported that the NMSRC had concluded after an "extensive investigation" that "Doo

Dominate competed doped up and with a broken knee." *Id.* at 47a. Following a sound-bite from Conwell, stating that Doo Dominate was unfit to race, Halsne reported that Mitchell "had been illegally working on the colt prior to the race." *Id.* at 47a. This broadcast sent viewers the message that the NMSRC had concluded that Mitchell was responsible for doping and killing this horse.[7] KWTV's broadcast was thus not a true and fair report of the NMSRC proceeding. *Mitchell*, 2002 OK CIV APP 115, ¶ 21.

At the close of evidence at trial, the District Court instructed the jury on the causes of action brought by Mitchell against Halsne and KWTV. In its opening instruction, the Court informed the jury that:

> Dr. Mitchell claims that the stories were false and defamatory and that the stories caused injury to himself and to his business. *He alleges that Defendants were negligent in broadcasting the stories.* Dr. Mitchell *further* alleges that the publication was a deliberate or reckless falsity.

PETITIONERS' APP. at 62a-63a (emphasis added). In its subsequent instruction on the elements of the defamation claim, the District Court instructed the jury that Mitchell was required to prove that the Defendants were negligent *or* acted in reckless disregard with respect to the truth of

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[7] Subsequent news broadcasts compounded the previous misrepresentations that Mitchell had been accused by either a federal lawsuit or the NMSRC of doping a horse. For example, a March 26, 1998, broadcast was introduced with the statement that KWTV had "showed how Mitchell was connected to the doping of a world-class racehorse and a world champion show horse." *Id.* at 50a. In a June 17, 1998, story, KWTV referred to Mitchell as "[a]n Oklahoma veterinarian, accused of doping-up some of this country's top show and race horses. . . . " *Id.* at 53a. KWTV was aware, however, neither the federal lawsuit nor the NMSRC ever accused Mitchell of "doping-up" a horse. *Mitchell*, 2002 OK CIV APP 115, ¶ 20.

the statements broadcast. RESP.'S APP. at 23-24. The jury was further instructed that if they found by clear and convincing evidence that the Defendants acted in reckless disregard with respect to the truth of the statements broadcast, then they were permitted to award Mitchell general and punitive damages. RESP.'S APP. at 24-25.

Following deliberations, the jury returned a verdict in favor of Mitchell on both the defamation and the false light claims. PETITIONERS' APP. at 31a. The jury found that the dollar amount of Mitchell's actual damages was $6,000,000. *Id.* The jury specially found that KWTV and Halsne had acted in reckless disregard of the truth of the statements published about Mitchell. *Id.* at 32a. The jury also awarded Mitchell $250,000 in punitive damages from each defendant.

On appeal, the Oklahoma Court of Civil Appeals affirmed the jury's verdict as to liability, finding the evidence sufficient to establish reckless disregard of the truth by Halsne and KWTV. *Mitchell*, 2002 OK CIV APP 115, ¶ 22. The Court further found the evidence of malice to be sufficient to justify the award of Category II punitive damages under Oklahoma law. *Id.* at ¶ 38. The Court of Appeals found, however, that the jury had erroneously been instructed that it could award presumed general damages without proof of harm because an Oklahoma statute prohibits such an award where the defamatory statements are published as part of a television broadcast. *Id.* at ¶ 28.[8] The Court of Appeals thus remanded the case

[8] Contrary to the suggestion at pages 18 and 19 of Petitioners' Brief, the Court of Appeals did *not* find that Mitchell failed to prove actual damages; the Court merely found that the jury instructions would have *permitted* an award of presumed damages and that such an award would violate state law. Mitchell in fact presented significant

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for a new trial as to the issue of compensatory damages alone. *Id.* at ¶ 41. The Court of Civil Appeals indicated that if the jury failed to award Mitchell any compensatory damages on remand, the award of punitive damages was to be vacated as a matter of state law. *Id.* at ¶ 39.

ARGUMENT AND AUTHORITIES

I. THIS COURT LACKS JURISDICTION TO REVIEW THE ORDER OF THE OKLAHOMA COURT OF CIVIL APPEALS BECAUSE IT IS NOT A "FINAL JUDGMENT" UNDER 28 U.S.C. § 1257(a).

From the earliest days of the federal judiciary, Congress has vested in the United States Supreme Court the authority to review federal-question decisions made by state courts. *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). For just as long, however, Congress has limited this Court's review of state court decisions to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ." 28 U.S.C. § 1257(a); *see also* Judiciary Act of 1789, § 25, 1 Stat. 85. This Court has thus recognized that 28 U.S.C. § 1257(a) "establishes a firm final judgment rule." *Jefferson*, 522 U.S. at 81. Under this rule, "[t]o be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Id.* (quoting *Market Street Ry. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945)).

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evidence of actual harm, including evidence of his own emotional distress and the decline of his business.

A. The judgment of the Court of Civil Appeals is not final under § 1257 because there are further proceedings to occur at the trial court level.

This Court has repeatedly stressed that "the finality rule 'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Id.* (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945)). Therefore, before the Court will review a state court determination, it must be clear that definitive disposition has been made of all the legal and factual issues in the case. As this Court has observed, "the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up – for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948).

In the instant case, the order of the Oklahoma Court of Civil Appeals is not a "final judgment" within the meaning of § 1257(a) because it does not render a definitive disposition of all the legal and factual issues in this case. While the order determines the issue of liability, the Court of Appeals has remanded the case to the District Court for a new trial as to compensatory damages. Because significant further proceedings are thus contemplated in this action, the requirement of finality is not met. *Republic Natural Gas*, 334 U.S. at 68; *see also* Robert L. Stern et al., SUPREME COURT PRACTICE, § 3.7 at 150 (the fact that a case will involve further proceedings on remand "provides a strong basis for finding the state court judgment nonfinal and thus nonreviewable at this juncture").

B. This case does not fall within the fourth exception to the finality rule articulated in *Cox Broadcasting*.

Despite the lack of technical finality, Petitioners contend that this case should be *treated* as final under the fourth exception to the finality rule outlined in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-483 (1975). This exception recognizes finality within the meaning of § 1257(a) where three distinct conditions are present: (1) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court"; *and* (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"; *and* (3) "a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 482-83. Because, as shown below, this case does not satisfy the second and third conditions set forth above, this Court lacks jurisdiction to hear Petitioners' claims. Moreover, because the proceedings remaining on remand are likely to raise additional federal questions, *Cox Broadcasting* suggests that review of any properly presented federal questions should await the conclusion of the proceedings on remand. *Id.* at 477.

1. A reversal of the Court of Civil Appeals on the existence of actual malice would not preclude the further proceedings contemplated below.

To fall within the fourth exception to the finality rule articulated by this Court in *Cox Broadcasting*, the Court must satisfy itself that "reversal of the state court on the federal issue would be preclusive of any further litigation

on the relevant cause of action. . . ." *Id.* at 482-83. Petitioners thus argue that "were this Court to conclude that, under the appropriate standard of independent review, the evidence presented at trial did not clearly and convincingly demonstrate actual malice, the reversal of the decision of the Court of Civil Appeals would preclude further litigation." PETITIONERS' BR. at 19. This contention is simply not true. To the contrary, no determination by this Court of the questions presented would prevent the Court of Civil Appeals from remanding this case for a new trial as to compensatory damages on both the defamation and false light claims.

First, it is conceded by Petitioners that Mitchell is a private figure. Therefore, while Mitchell's claim for false light invasion of privacy requires a showing of reckless disregard as a matter of state law, this standard is not mandated by the federal constitution. *Colbert v. World Pub'g Co.*, 1987 OK 116, 747 P.2d 286, 291-92.[9] The Oklahoma Court of Civil Appeals has determined that the evidence was sufficient to establish reckless disregard as a matter of Oklahoma law, *Mitchell*, 2002 OK CIV APP 115, ¶¶ 13 & 22, and the Oklahoma Supreme Court declined

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[9] In *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714 (10th Cir. 2000), a case involving a false light claim brought by a private figure plaintiff against a media defendant, the Tenth Circuit rejected the plaintiff's argument that the Oklahoma Supreme Court would no longer apply the *Colbert* recklessness standard and would instead follow other states that have permitted recovery under a negligence theory in false light media cases involving private individuals. The Court found that the plaintiff "has cited no authority subsequent to *Colbert* that justifies [his] prediction that the Oklahoma Supreme Court would retreat from the *Colbert* requirements." *Id.* at 720. This language clearly indicates that the recklessness standard is a matter of Oklahoma state law and is not *constitutionally* mandated in false light media cases involving private plaintiffs, such as the instant case.

to review this determination. Because this is purely a question of state law, this Court does not have jurisdiction to review the Oklahoma courts' actions. Accordingly, even if this Court were to find the evidence presented insufficient to establish actual malice as a matter of federal constitutional law, this would not preclude further proceedings on Mitchell's false light claim.

Second, the District Court properly instructed the jury that, for Mitchell to recover on his defamation claim, he was required to prove that the Defendants *either* were negligent *or* acted in reckless disregard with respect to the truth of the statements broadcast. RESP.'S APP. at 23-24. While Mitchell could expand the *relief* available by showing the greater culpability, such a showing was not necessary to sustain *liability*. *Mitchell*, 2002 OK CIV APP 115, ¶ 6; *Martin v. Griffin Television, Inc.*, 1976 OK 13, 549 P.2d 85.

The jury in this case made a special finding that there was clear and convincing evidence Petitioners acted in reckless disregard of the truth of the statements published. PETITIONERS' APP. at 32a. The Court of Appeals affirmed, finding "clear and convincing evidence from which the jury could find he made the statements with reckless disregard as to their falsity." *Mitchell*, 2002 OK CIV APP 115, ¶ 13. The Court of Appeals also found that because Mitchell proved malice, he did not need to prove negligence. *Id.* This is, of course, because the lesser degree of culpability is subsumed within the greater degree of culpability – every time a reporter publishes a story "with knowledge that it was false or with reckless disregard of whether it was false or not," *New York Times v. Sullivan*, 376 U.S. 254 (1964), that reporter has failed to exercise ordinary care.

Because the determination by the jury and Court of Appeals that there was clear and convincing evidence of reckless disregard would necessarily encompass a finding of negligence (a lesser standard of culpability with a lesser standard of proof), whatever ruling this Court might make on the question of actual malice would not affect Petitioners' *liability* on the defamation claim.[10] It would only affect the availability of presumed damages. However, in this case, the Oklahoma Court of Civil Appeals has already held that presumed damages are not permitted on state law grounds. Therefore, a reversal of the Court of Appeals on the question of actual malice will not affect the question of liability or the availability of presumed damages. Whatever this Court's holding, this case will return to the District Court for a new trial on the issue of compensatory damages, with presumed damages not permitted.

The only issue as to which the existence of actual malice could have any relevance whatsoever is Mitchell's request for punitive damages. This Court has held that States may not permit recovery of punitive damages in defamation actions in the absence of actual malice, at least in actions involving matters of public concern. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *Dun &*

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[10] While the question of the existence of negligence is apparently also subject to heightened review on appeal, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990), for the reasons discussed in Sections III and IV, *ante*, the Oklahoma Court of Civil Appeals conducted a constitutionally-adequate review of the record and found evidence sufficient to establish a level of culpability beyond (and subsuming) negligence. The existence or non-existence of expert testimony as to Petitioners' negligence is irrelevant. Contrary to Petitioners' suggestion, under Oklahoma law, there is no requirement that expert testimony be offered to establish negligence, although this will normally be the case. *Malson v. Palmer Broadcasting Group*, 1997 OK 42, 936 P.2d 940, 941.

Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). As the Court of Appeals indicated, however, its affirmance of the award of punitive damages in this case was conditioned upon the jury awarding Mitchell actual damages on retrial. Therefore, at this point, there is no way to know whether an award of punitive damages will be made in this case. Given this uncertainty – and given the fact that the award or non-award of punitive damages will be purely ministerial and will not involve the expenditure of any time, effort or money on behalf of the parties – it would appear more advisable to await an actual award of punitive damages before deciding this question.

2. A refusal immediately to review the Court of Civil Appeals' decision will not seriously erode federal policy.

For a case to fall within the fourth *Cox Broadcasting* exception, it must also be established that "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox Broadcasting*, 420 U.S. at 483.[11] In the instant case, no federal policy is in danger of erosion if KWTV is forced to retry damages and then appeal all resulting federal issues at that time. This Court's orders do not leave in place any statute or injunction which is operating as a prior restraint on the press

[11] While this element is virtually unaddressed by Petitioners, cases from this Court establish that it is an essential condition. Thus, where this Court has found that delaying review until after trial would be intolerable, this Court has treated the State court decision as final. *See, e.g., Cox Broadcasting*, 420 U.S. at 485-86; *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974). Where this Court has found no federal policy at risk of erosion, however, this Court has declined to consider the state court decision "final." *See, e.g., Florida v. Thomas*, 532 U.S. 774, 780 (2001); *Flynt v. Ohio*, 451 U.S. 619, 621 (1981).

during the pendency of the lower court proceedings as appears to be the case in virtually every First Amendment action reviewed by the Supreme Court under an exception to the finality rule. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (injunction prohibited enforcement of boycott of white-owned businesses); *Cox Broadcasting*, 420 U.S. at 485-86 (statute prohibited media from publishing name of rape victim); *National Socialist Party v. Skokie*, 432 U.S. 43 (1977) (injunction prohibited petitioners from marching or parading); *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241 (1974) (statute required newspaper to carry candidate's reply to editorial).

3. The retrial on the issue of damages is likely to raise additional federal issues.

This Court has further observed that in "most, if not all, of the cases in [the four *Cox Broadcasting*] categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date. . . ." *Cox Broadcasting*, 420 U.S. at 477. Thus consideration of the federal questions raised in such cases prior to their conclusion would run no risk of subjecting the courts or the parties to " 'the inconvenience and costs of piecemeal review.' " *Id.* at 478 n.7 (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)).

In this case, however, there is a strong probability that additional federal questions will be raised by the jury's award of compensatory damages on remand. For example, in their brief before the Oklahoma Court of Civil Appeals, Halsne and KWTV argued that the award of compensatory damages by the jury in this case was "grossly excessive" and thus violated the First and Fourteenth Amendments to the U.S. Constitution. If a second

jury were to award a similar or larger sum to Mitchell, Halsne and KWTV would likely reiterate their federal constitutional challenge to that award. Additionally, the Court of Civil Appeals has held that, if the jury awards *any* compensatory damages to Mitchell, the full award of punitive damages will stand. *Mitchell*, 2002 OK CIV APP 115, ¶ 39. In the unlikely event that the jury on retrial were to award only *nominal* damages to Mitchell, one could anticipate that Petitioners might challenge the award of $500,000 in punitive damages under the Fourteenth Amendment and *BMW of North America v. Gore*, 517 U.S. 559 (1996).

4. Conclusion.

As the foregoing demonstrates, this case does not fall under the fourth exception to the finality rule articulated by this Court in *Cox Broadcasting*. The Oklahoma Court of Civil Appeals' decision did not terminate the instant litigation. Nor would a reversal by this Court on the federal question terminate the instant litigation. Rather, regardless of how this Court might determine any of the properly-presented federal issues, this case will return to the District Court for a new trial as to compensatory damages on both the defamation and false light claims, with presumed damages not permitted.

II. REVIEW OF THE PRIMARY QUESTION PRESENTED IS UNNECESSARY BECAUSE THE RECORD DEMONSTRATES THAT THE OKLAHOMA COURT OF CIVIL APPEALS APPLIED THE PROPER STANDARD OF REVIEW TO THE QUESTION OF ACTUAL MALICE.

The Supreme Court has instructed that "[j]udges, as expositors of the Constitution, must independently decide

whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 511 (1984). In conducting this independent review "it is not actually necessary to review the 'entire' record to fulfill the function of independent appellate review on the actual-malice question; rather, only those portions of the record which relate to the actual-malice determination must be independently assessed." *Id.* at 514 n.31. It must be apparent that the reviewing court has "examine[d] for [itself] the statements in issue and the circumstances under which they were made" to see whether they are "of a character which the principles of the First Amendment . . . protect." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)).

Here, the Court of Civil Appeals acted precisely as directed by this Court. First, the Court of Civil Appeals noted that the element of actual malice is subject to a heightened clear-and-convincing standard of proof, and that this is the only element subject to this standard. *Mitchell*, 2002 OK CIV APP 115, ¶ 8. As shown below, the Court of Civil Appeals then conducted a thorough, independent review of the portions of the record that relate to the actual-malice question and concluded that there *was* clear and convincing evidence that KWTV broadcast defamatory statements about Mitchell with reckless disregard for their truth or falsity.[12] There is thus

[12] Even if the Court of Appeals' correct *general* statement that a jury verdict must be affirmed if there is "any competent evidence reasonably tending to support it," could – taken in isolation – suggest that an insufficient standard of review was applied to the question of

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no manner in which the Court of Appeals' opinion failed to comport with the standard of review articulated by the Supreme Court in *Bose* and *Harte-Hanks*.

In this case, the portions of the record that relate to the actual-malice determination consist of the KWTV broadcasts, Halsne's testimony, Mitchell's testimony, the federal complaint, and the NMSRC file. That the Court of Appeals independently reviewed the defamatory broadcasts in their entirety is evident from the fact that the Court of Appeals quotes various statements made in the broadcasts which were not quoted by either party in the appellate briefing. *See Mitchell*, 2002 OK CIV APP 115, ¶¶ 11 (first quoted passage), 19 (first sentence), & 20 (first quoted sentence). That the Court of Appeals independently reviewed Halsne's testimony in its entirety is evident from the fact that the Court of Appeals quotes statements by Halsne describing his review of the NMSRC file which were not quoted by either party in the appellate briefing. *See id.* at ¶ 18 (second indented passage). That the Court of Appeals independently reviewed Mitchell's testimony in its entirety is evident from the fact that the Court of

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actual malice, where an appellate court's opinion as a whole demonstrates that the proper analysis was conducted, it matters not that statements read in isolation might suggest an improper standard. *Harte-Hanks*, 491 U.S. at 667-68; *see also Powell v. State*, 1995 OK CR 37, ¶ 3, 906 P.2d 765, 784 (Order Granting Rehearing) (upholding sentence despite fact that Court's original opinion articulated an improper standard of review, stating "[w]e have reviewed the opinion and find that [the correct] standard was *employed* by this Court") (emphasis added); *Moorhead v. First Piedmont Bank & Trust Co.*, 256 S.E.2d 414, 416 (S.C. 1979) (affirming trial court decision where, through apparent inadvertence, the trial court recited the incorrect standard of review); *Bill Parker & Assocs. v. Rahr*, 456 S.E.2d 221, 223 (Ga. App. 1995) (affirming trial court decision where trial court apparently misstated relevant burden of proof).

Appeals quotes testimony from Mitchell which was not quoted by the parties in the appellate briefing. *See id.* at ¶ 9 (fifth sentence). That the Court of Appeals independently reviewed the complaint in the federal lawsuit is evident from the fact that the Court of Appeals sets forth the allegations of the complaint in far greater length than did either party in the appellate briefing. *See id.* at ¶ 10 (indented passages). Indeed, the Court of Appeals reviewed the complaint so closely that it even found a discrepancy between the allegations in the complaint and the KWTV broadcasts that was not raised by Mitchell. *See id.* at ¶ 12 (noting that complaint alleged the horse's condition was concealed from Mitchell by silicone pads on the horse's hoof). Finally, that the Court of Appeals conducted an independent review of the NMSRC file is evident from the fact that the Court of Appeals refers to details of an NMSRC rule that were not cited by either party in the appellate briefing. *See id.* at ¶ 15 n.3 (noting that mepivacaine was prohibited within 72 hours of race).

After conducting its thorough review of the record, the Court of Appeals held that there *was* clear and convincing evidence of actual malice in this case. As to the stories about This Lady Sings, the Court of Appeals recited the various discrepancies between the allegations described by Halsne in his broadcasts and the allegations actually contained in the federal lawsuit. As the Court of Appeals stated, "Halsne's own admission he was familiar with the complaint is clear and convincing evidence from which the jury could find he made the statements with reckless disregard as to their falsity." *Id.* at ¶ 13.[13]

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[13] In *Curtis Pub'g Co. v. Butts*, 388 U.S. 130, 139 (1967), the Supreme Court affirmed the jury verdict for the plaintiff where the trial judge had similarly described his review of the jury verdict as follows:

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The Court of Appeals also found the jury's verdict to be supported by the evidence relating to the news stories about Doo Dominate. *Id.* at ¶ 14. Based on the unambiguous public documents of the NMSRC, the Court of Appeals found that independent laboratory testing had failed to confirm the presence of the mepivacaine in Doo Dominate. *Id.* at ¶ 15. The NMSRC Notice of Contemplated Action did not charge Mitchell with giving Doo Dominate mepivacaine. *Id.* at ¶ 16. The NMSRC brought a separate action against the owner and trainer of Doo Dominate for the use of mepivacaine, but this action was dismissed because, under NMSRC rules, there was no positive drug test. *Id.* at ¶ 17. These documents all indicated that the NMSRC had concluded that Doo Dominate was not "doped" prior to the All American Futurity and that the NMSRC had never accused Mitchell of doping the horse. Halsne admitted to reviewing these documents before airing his reports.[14] *Id.* at ¶ 18.

After reviewing the various KWTV broadcasts, the Court of Appeals found, "[t]his record presents sufficient evidence from which the jury could find Halsne falsely reported the NMSRC found Doo Dominate raced doped-up and Mitchell was linked to the doping. *There is evidence that Halsne knew the statement was false or acted with reckless disregard of whether it was false or not.*" *Id.* at ¶ 21 (emphasis added). This statement, coupled with its

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"there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not."

[14] Petitioners' arguments that they should not be forced to investigate the truth of the broadcasts are undermined by the fact that Halsne *already* possessed and was familiar with the unambiguous public documents establishing the falsity of his broadcasts. There was thus no need to investigate.

earlier recognition that such evidence was reviewed to satisfy a clear and convincing standard, clearly represents the Court of Appeals' independent conclusion that the record in this case contained clear and convincing evidence of actual malice. The review conducted by the Court of Appeals thus comports with the standards enunciated by this Court in *Bose* and *Harte-Hanks*, and review of this case is not necessary.

III. REVIEW IS UNNECESSARY BECAUSE THE COURT OF CIVIL APPEALS PROPERLY CONCLUDED THAT THE RECORD CONTAINS CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE.

Petitioners' primary claim regarding the sufficiency of the evidence is that the appellate court reviewed the entire record only to determine whether there was evidence which supported the jury's verdict, rather than weighing all the evidence to determine whether, on balance, it supported the Defendants' case. Even if this were true, decisions from this Court and others indicate that review of the record in a light favorable to the party who prevailed before the jury does not fail to satisfy the constitutionally-mandated independent review.

This Court has indicated that in conducting the constitutionally-required independent review, a reviewing court must still accept the jury's underlying credibility assessments and factual determinations unless they are clearly erroneous. *Harte-Hanks Communications*, 491 U.S. at 688. Further, this Court has maintained that the requirement of independent review preserves the "due regard" that is ordinarily given to the trial judge's opportunity to observe the demeanor of witnesses. *Bose*, 466 U.S. at 499-500. This Court also noted that "[t]he independent review function is not equivalent to a 'de novo'

review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff." *Id.* at 514 n.31.

Apart from the finding of actual malice, to which the rule of independent review applies, therefore, the other findings of fact in a defamation case are properly tested under the clearly erroneous standard of review. *Id.*; *see also Brown v. Petrolite Corp.*, 965 F.2d 38, 46 (5th Cir. 1992). Thus state courts have concluded that their task is to "determine what evidence the jury reasonably accepted as credible, and whether this evidence clearly and convincingly establishes actual malice." *Beal v. Bangor Pub'g Co.*, 714 A.2d 805, 808 (Me. 1998); *see also WJLA-TV v. Levin*, 564 S.E.2d 383, 392 (Va. 2002) (where jury has found by clear and convincing evidence that defendant published statements with actual malice, reviewing court in conducting its independent review of the record "must view that record in a light favorable to the plaintiff").

In this case, the record contains an abundance of objective evidence supporting the jury's conclusion that, despite his claims to the contrary, Halsne entertained serious doubts as to the truth of his stories about Mitchell, and that his failure to investigate was a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Conwell's story.[15] While it is

[15] While the standard of actual malice is a subjective one, this does not mean that the trier of fact is limited to the defendant's own version of what was in his mind at the time of publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("[p]rofessions of good faith" do not insulate a defendant from liability). Rather, "[t]he subjective determination of whether [a defendant] in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be

(Continued on following page)

unnecessary to detail all such evidence, the jury could have based its finding of actual malice, for example, on the following.

Halsne's reports regarding This Lady Sings purport to describe the allegations made in a federal lawsuit. Halsne had a copy of this lawsuit and was familiar with it. Halsne and KWTV repeatedly reported that Mitchell had been "accused" in the lawsuit of "doping" or "drugging" This Lady Sings in order to mask her injuries and fraudulently induce a third party to purchase the injured horse. The lawsuit, however, on its face contained no such allegations.

Additionally, prior to airing any reports regarding Doo Dominate, Halsne obtained a copy of the NMSRC's final order in the Mitchell matter. This order indicated that Mitchell had been disciplined for practicing veterinary medicine on the grounds of a New Mexico racetrack without the appropriate license. It also demonstrated on its face that Mitchell had been cleared of charges that he had assisted the owner and trainer of Doo Dominate in running an unsound horse.

After familiarizing himself with this report, Halsne traveled to New Mexico to meet with Conwell. His sole meeting with Conwell consisted of a 12 or 13 minute interview, during which Conwell allegedly told him that

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rare for a defendant to admit such doubts. . . . " *Bose Corp. v. Consumers Union of United States*, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984); *see also Beal v. Bangor Pub'g Co.*, 714 A.2d 805, 807 (Me. 1998) ("Rare is the instance in which a defendant journalist admits to publishing a defamatory article with either knowledge of, or reckless disregard to, the statement's falsity. . . . "). A failure to investigate may provide circumstantial evidence from which one may infer that the defendant entertained doubts as to the truth of the statements published. *See, e.g., Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

Mitchell "doped" and "helped to kill" Doo Dominate. Immediately after this interview, the NMSRC made the entire investigative file regarding Doo Dominate available to Halsne and his camera man. Despite his awareness that the NMSRC notice of proposed action and final order both contradicted Conwell's story, Halsne decided not to take advantage of this opportunity to review the investigative file to evaluate the truth of Conwell's statements. Instead, Halsne just picked out a few documents which supported Conwell's story, virtually all of which were authored by Conwell himself. Halsne deliberately ignored documents that would have cast doubt on Conwell's story. Thus, when asked whether he was aware that there was a negative drug test on Doo Dominate after the original positive, Halsne responded that "our interest was the positive drug test. . . ." Halsne also testified that he was not interested in knowing the outcome of the drugging charges against the owner and trainer of Doo Dominate because he "was more interested in Dr. Mitchell's connection" to the horse.

Halsne's only attempt at justifying his disregard of the file unraveled spectacularly before the jury when he was caught in a flagrant falsehood, and his elaborate explanation was exposed as pure invention. Halsne repeatedly told the jury that a full review of the file was unnecessary because Conwell had walked him through the documents, and that this guidance had ensured that he reviewed and understood the crucial documents. Both Defendants' expert witness *and* the owner of KWTV told the jury that such guidance would be *absolutely necessary*, given the technical nature of the documents. Halsne even told the jury that it was Conwell's ability to point out crucial documents that confirmed his credibility, stating, "I think we trusted his judgment, especially when he backed it up with documents. . . ." Conwell, however, flatly denied that he had shown Halsne *any* documents or that he had even been in the building when Halsne was reviewing them.

When told that Halsne had so testified, Conwell reiterated "I did not go through the documents with Mr. Halsne."

Where the jury heard Halsne, his expert, and his employer emphasize that Conwell's assistance was crucial to understanding the investigative file; and where the jury heard Halsne testify repeatedly that he received such assistance; and where Conwell unequivocally denied that he provided such assistance; the jury was entitled – if not compelled – to conclude that Halsne wholly fabricated the investigation he had testified was essential.[16]

IV. PETITIONERS HAVE NOT PRESERVED THE QUESTION OF WHETHER ACTUAL MALICE MAY BE PREMISED ON A DEFENDANT'S RATIONAL INTERPRETATION OF AN AMBIGUOUS PUBLIC DOCUMENT.

Petitioners have asked this Court to consider the question "[w]hether, in a defamation and false light invasion of privacy case, the First and Fourteenth Amendments, as interpreted by *Time, Inc. v. Pape*, 401 U.S. 279 (1971), permit a finding of actual malice solely on the basis that the appellate court's interpretation of an ambiguous public document differs from the rational

[16] Not only did Halsne invent a controversy, he also ignored clear warnings of the essential dishonesty of his crusade, another classic indicium of malice. KWTV and Halsne received two letters from an attorney for Mitchell warning them that the Doo Dominate story was false. Halsne took no additional action to verify the story after receiving these warnings, other than to obtain a copy of the full investigative file, which sat unread on his desk. Nevertheless, after receiving the attorney's initial letter, KWTV broadcast five more stories about Mitchell based solely on Conwell's allegations. Under such circumstances, the jury was entitled to find that Halsne's bare assertion of a lack of malice was unpersuasive and grossly outweighed by other, more objective evidence.

interpretation given the document by the broadcaster. . . ." PETITIONERS' BR. at i. As required by Supreme Court Rule 14(1)(g)(i), Petitioners represent that they raised this issue before the Court of Civil Appeals, and refer this Court to the relevant portion of their reply brief submitted to the appellate court.[17] Petitioners then state, without further explanation, that "[t]he Court of Civil Appeals did not discuss the issue in its opinion." PETITIONERS' BR. at 29 n.24.

It would appear, however, that the reason the Court of Civil Appeals did not discuss this issue is that Petitioners had not preserved it for appellate review. It is axiomatic that, as a matter of Oklahoma law, "a party will not be permitted to raise issues on appeal which were not raised in the trial court." *Continental Nat. Gas, Inc. v. Midcoast Nat. Gas, Inc.*, 1996 OK CIV APP 157, 935 P.2d 1185, 1189. It appears that Petitioners never raised the "rational interpretation of an ambiguous public document" issue before the District Court in this matter. Indeed, while Supreme Court Rule 14 requires that Petitioners specify "the stage in the proceedings, both *in the court of first instance* and in the appellate courts, when the federal questions sought to be reviewed were raised," U.S. Sup. Ct. Rule 14(1)(g)(i) (emphasis added), Petitioners make no claim that this issue was raised before the District Court. Because this issue was thus not preserved for appellate review, and the Court of Civil Appeals accordingly

[17] Petitioners' reference to this brief fails to satisfy Rule 14, however, because the brief was stricken from the record by the Oklahoma Supreme Court for violating that court's length requirements. RESP.'S APP. at 26. Petitioners subsequently filed a *corrected* reply brief on June 20, 2002, which was accepted by the Court. *Id.* The corrected reply brief omits some of the text appearing in Petitioners' Appendix. RESP.'S APP. at 27-29.

refrained from addressing it, Petitioners may not now raise the issue in this Court.

Even if this Court were to address the impact of *Time, Inc. v. Pape*, 401 U.S. 279 (1971), on this litigation, however, such consideration would not aid Petitioners' case. In *Time*, a libel action was brought by a police officer against a magazine based on an article which described a report issued by the United States Commission on Civil Rights. The magazine reported as a charge by the Commission what was really a description by the Commission of the allegations in a complaint filed in a civil rights action. *Id.* at 284-85. The sole issue on appeal was whether the omission of the word "alleged" in reference to Commission's description of the complaint showed actual malice. *Id.* at 283. This Court ultimately found that, when the magazine failed to state that the Commission in reporting the incident had confined itself to the allegations of a complaint, its conduct was insufficient to sustain a jury finding of actual malice.

In reaching this conclusion, however, the Court noted that:

> A press report of what someone has said about an underlying event of news value can contain an almost infinite variety of shadings. Where the source of the news makes bald assertions of fact – such as that a policeman has arrested a certain man on a criminal charge – there may be no difficulty. But where the source itself has engaged in qualifying the information released, complexities ramify.

Id. at 286. What makes *Time* inapplicable to the instant case is that the reporter in *Time* was in the latter situation; reporting on an ambiguous secondary source's description of an incident. Halsne, however, was in a situation much more akin to the former described above;

that is, he was reporting on an incident based on unambiguous *primary* sources (*i.e.,* the federal court complaint and the NMSRC notice of proposed action and final order). Halsne tries to put himself into the latter category by claiming that his interview with Conwell added ambiguity to his understanding of the events in New Mexico. However, where Halsne was in possession of and familiar with an unambiguous primary source, *Time* does not stand for the proposition that he can use a secondary source like Conwell to create an illusion of ambiguity where none exists.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

THIS OPINION HAS BEEN RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA

DIVISION III

H.L. MITCHELL, Plaintiff/Appellee, vs. GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation, and CHRIS HALSNE, an individual, Defendants/Appellants.	)	Case No. 96,640

APPEAL FROM THE DISTRICT COURT OF
CREEK COUNTY, OKLAHOMA

HONORABLE JOE SAM VASSAR, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

(Filed Sep. 6, 2002)

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OPINION BY CAROL M. HANSEN, Presiding Judge:

¶1 Defendant/Appellants, Griffin Television, L.L.C. (Griffin) and Chris Halsne (collectively KWTV), seek review of the trial court's judgment based on a jury verdict in favor of Plaintiff/Appellee, H.L. Mitchell. We affirm as to the finding of liability and award of punitive damages, reverse as to compensatory damages, and remand for new trial as to compensatory damages.

¶2 Mitchell is a veterinarian in Bristow, Oklahoma. Between January 27, 1998, and September 13, 1998, KWTV broadcast seven stories dealing with Mitchell's treatment of a halter horse named This Lady Sings at the 1997 World Quarter Horse Championships in Oklahoma City and the death of a quarter horse named Doo Dominate at the All American Futurity in New Mexico on September 5, 1994. Mitchell sued KWTV for defamation and false light invasion of privacy arising from the stories.

¶3 A jury trial took place in June 2001. At the close of evidence, KWTV moved for a directed verdict. The trial court denied the motion and submitted the case to the jury. The jury specially found Griffin and Halsne acted in reckless disregard of the truth of the statements published and intentionally and with malice concerning Mitchell. It awarded $6,000,000.00 in actual damages against Griffin and Halsne, $250,000.00 in punitive damages against Griffin, and $250,000.00 in punitive damages against

Halsne. The trial court granted judgment for the verdict amount, as well as $1,323,950.00 in prejudgment interest and $5,010.02 in costs, for a total judgment amount of $7,828,960.02. KWTV appeals from that judgment.

I

¶4 One group of KWTV's contentions raises the issue of whether there was sufficient evidence for the jury to hold KWTV liable to Mitchell. KWTV argues the trial court should have directed a verdict in its favor because Mitchell (1) failed to present evidence from which a jury could reasonably conclude any of the statements about which he complained is substantially false, (2) presented no evidence of special damages to support a defamation *per quod* claim, (3) failed to submit expert testimony that KWTV departed from the standard of care to which reasonable journalists ordinarily adhere under similar circumstances, (4) failed to present clear and convincing evidence of actual malice, and (5) put on no evidence any harm to his reputation was caused by false statements rather than true ones. Because the last contention relates to damages, we will address it in Part II below.

¶5 In order to recover for defamation, a private figure must prove (1) a false and defamatory statement, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher; and (4) either the actionability of the statement irrespective of special damage, or the existence of special damage caused by the publication. *Sturgeon v. Retherford Publications, Inc.*, 1999 OK CIV APP 78, 987 P.2d 1218, 1223. If the publication is a fair and true report of a proceeding authorized by law or anything said in the proceeding, it is

privileged. 12 O.S.1991 §1443.1(A). Negligence is the failure to exercise ordinary care, which is "that degree of care which ordinarily prudent persons engaged in the same kind of business usually exercise under similar circumstances." *Martin v. Griffin Television, Inc.,* 1976 OK 13, 549 P.2d 85, 92. Slander is actionable *per se,* without a showing of actual damage, if it falls within the first four sections of 12 O.S.1991 § 1442.[1] *Standifer v. Val Gene Management Services, Inc.,* 1974 OK CIV APP 41, 527 P.2d 28, 31.

¶6 While negligence is the minimum level of fault necessary for a private figure to recover for slander, the plaintiff may expand the relief available by showing greater culpability on the defendant's part. Upon a showing of actual malice, the plaintiff may recover punitive damages, and, where otherwise allowed, presumed damages.[2] *Martin v.*

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[1] 12 O.S.1991 § 1442 provides,

Slander is a false and unprivileged publication, other than libel, which:

1. Charges any person with crime, or with having been indicted, convicted or punished for crime.

2. Imputes in him the present existence of an infectious, contagious or loathsome disease.

3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit.

4. Imputes to him impotence or want of chastity; or,

5. Which, by natural consequences, causes actual damage.

[2] See Part II below for a discussion of presumed damages.

Griffin Television, Inc., 1976 OK 13, 549 P.2d 85, 93. "Actual malice" means "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). Proof of malice obviates the need to prove negligence.

¶7 In order to recover for false light invasion of privacy, the plaintiff must show (1) the defendant gave publicity to a matter concerning the plaintiff that placed the plaintiff before the public in a false light, (2) the false light in which the plaintiff was placed would be highly offensive to a reasonable person, and (3) the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. *McCormack v. Oklahoma Pub. Co.,* 1980 OK 98, 613 P.2d 737, 740.

¶8 In reviewing a judgment based on a jury verdict, we may not disturb the jury's verdict where there is any competent evidence reasonably tending to support it. The jury is the exclusive arbiter of the credibility of the witnesses, and its verdict is conclusive as to all disputed facts and all conflicting statements. We must determine the sufficiency of the evidence to sustain a judgment in light of the evidence tending to support it, together with every reasonable inference deducible therefrom, rejecting all evidence adduced by the adverse party which conflicts with it. *Florafax Intern., Inc. v. GTE Market Resources, Inc.,* 1997 OK 7, 933 P.2d 282, 287. As to the element of malice, the evidence must be sufficient for a trier of fact to find or infer its existence subject to a clear and convincing standard of proof. *Herbert v. Oklahoma Christian Coalition,* 1999 OK 90, 992 P.2d 322, 328. This standard applies to both public officials and private figures. *Gaylord*

Entertainment Co. v. Thompson, 1998 OK 30, 958 P.2d 128, 141 n. 46. However, it does not apply to any element other than malice.

¶9 The news stories of which Mitchell complains began with reports relating to This Lady Sings. Mitchell testified he examined the horse soon after she was unloaded at the fairgrounds before the horse show. He said she was "a little tender on her right front foot" and had twisted her shoe. He testified he told the trainer the horse needed a farrier. Mitchell said the trainer was unable to find a farrier that evening and was worried the horse would "fret all night and gan up and lose weight and quit drinking." Mitchell said he wrapped her foot, but could see she was not very comfortable on it, so he "did a Sarapin posterior digital heel block on her" with "three-quarters of a cc" of Sarapin, which was "a minute amount." He said Sarapin is called a natural block in holistic circles and wears off in 24 to 36 hours. Mitchell testified This Lady Sings was not hobbling when he saw her.

¶10 This Lady Sings was sold after the show. On January 21, 1998, her purchaser sued the sellers and trainer in federal district court for rescission of the contract and damages for breach of warranty and fraud in the inducement of the contract. The complaint alleged as follows:

> 12. That on November 15, 1997, Skoda [the purchaser] had the mare inspected by Dr. Mitchell, a veterinarian on the grounds of the show, who conducted a prepurchase exam of the horse and represented to Skoda, and his insurer, that the horse was sound.
>
> . . .

16. That the mare was then presented to the previous examining veterinarian, which [sic] found some bruising on the hoof wall, apparently related to improper shoeing and that silicone had been placed under the pad of the mare's left hoof; the silicone pads prevented a clear view of the sole at the time of the original purchase examination.

. . .

19. That Skoda conducted a further investigation into the unsoundness of the mare and later on November 22, 1997, learned from Dr. Mitchell that prior to the Amateur Division Showing, he had "blocked" one of Casper's adult horses scheduled to appear in the Amateur Division showing; said block being a veterinary technique to numb pain, so that the horse will not present outward manifestation of pain, or unsound gate.

20. That Casper had only one adult horse to be presented and [sic] the said showing, to wit; "This Lady Sings".

21. That Casper knew that the mare was unsound at the time of the negotiations with Skoda and had undertaken specific overt acts to disguise the lame condition.

¶11 In the January 26, 1998 10:00 p.m. news broadcast, Halsne reported,

> This Lady Sings was named best-amateur-in-the-world just three months ago. Now, her new trainer . . . says lameness in her front feet have [sic] ended the horse's career. . . .
>
> There is a dark secret to this horse's injury. . One the American Quarter Horse Association has

> under investigation. This Lady Sings was hobbling before the World Championships. . and was given a painkiller. . . .
>
> What [Mitchell] did was put a chemical called Sarapin in her foot to mask the pain.

Prior to the next evening's broadcast, KWTV ran a promotional tape in which the announcer stated, "An Oklahoma vet linked in a federal lawsuit to masking the injuries of a champion show horse." In the 10:00 p.m. broadcast, Halsne reported,

> The federal case says Mitchell knew that This Lady Sings was hobbling before the world show. Afterwards, he examined the horse for a new buyer and didn't disclose the mare's previous injury. . . .
>
> Dr. Mitchell claims the horse was badly shod when it came to the world championships, and he simply treated a bruise. The new buyer says the horse's health condition is chronic.

At trial, Halsne testified he was familiar with the complaint and had it in his possession prior to airing the story.

¶12 The complaint in the federal suit did not say Mitchell knew the horse was hobbling before the horse show. While it did accuse the trainer of acting with the purpose of disguising, or masking, the horse's lame condition, it did not allege Mitchell acted with that purpose. It alleged Mitchell told the buyer he blocked the horse. It alleged the block is a veterinary technique to numb pain, so that the horse will not appear unsound, but it did not allege Mitchell intended it for the purpose of masking the horse's unsoundness. The complaint did not accuse Mitchell of concealing the horse's condition when he did

the prepurchase exam; rather it alleged the horse's condition was concealed from Mitchell by the silicone pad on the mare's left hoof.

¶13 Halsne's statements do not truly and fairly report the allegations in the complaint. Therefore, his publication is not privileged pursuant to 12 O.S.1991 § 1443.1(A). The complaint itself, when compared with Halsne's statements, is evidence from which the jury could find Halsne made false and defamatory statements to third parties about Mitchell and that the statements tended to injure Mitchell in his profession. Halsne's own admission he was familiar with the complaint is clear and convincing evidence from which the jury could find he made the statements with reckless disregard as to their falsity. Because Mitchell put on evidence of malice, he did not need to prove negligence. The statements were defamatory *per se* and not *per quod;* therefore, Mitchell did not need to prove special damages in order to establish liability for slander pursuant to 12 O.S.1991 § 1442(3). This same evidence would support a finding by the jury of each of the elements of a false light invasion of privacy claim.

¶14 The jury's verdict is also supported by the evidence relating to the news stories about Doo Dominate. Mitchell treated Doo Dominate prior to the 1994 All American Futurity race at Ruidoso Downs racetrack in New Mexico. During the race, the horse stumbled and broke both front legs. Track veterinarians euthanized the horse, took blood and urine samples, and removed his front legs for necropsy. Two other horses broke down and were euthanized that day.

¶15 Wayne Conwell, the Medication Manager for the New Mexico State Racing Commission (NMSRC), investigated Doo Dominate's breakdown. He sent the samples for testing and the legs for necropsy. The necropsy report concluded,

> This horse had chronic severe carpal joint disease affecting the left carpus. There were chronic and acute fractures of the radial carpal bone and the 3rd carpal bone in the left carpus.
>
> . . .
>
> In summary, the chronic carpal joint disease in the left carpus appeared severe enough to make this horse unfit for racing. Acute left carpal breakdown may have been responsible for the acute fracture of the cannon bone in the opposite leg.

The laboratory to which Conwell sent the urine sample reported the sample tested positive for mepivacaine, a prohibited pain-killer.[3] The horse's owner exercised his right to send a split sample to an independent laboratory. That laboratory's results failed to confirm the presence of mepivacaine.

¶16 The NMSRC issued a Notice of Contemplated Commission Action against Mitchell, charging him with practicing veterinary medicine in New Mexico without a license and with assisting Doo Dominate's owner and trainer in running an unfit horse. It did not charge him

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[3] At the time of the 1994 race, mepivacaine was prohibited within 72 hours of race day. However, the NMSRC later amended its rules to allow a threshold amount of the drug.

with giving the horse mepivacaine. After a hearing, the NMSRC issued an order finding Mitchell practiced veterinary medicine at Ruidoso Downs without holding a license issued by the New Mexico Board of Veterinary Examiners. It permanently revoked his owner's license.[4] However, the order specifically concluded the evidence was insufficient to prove Mitchell assisted the owner and trainer in running an unfit horse.

¶17 The NMSRC brought a separate action against the owner and trainer for the use of mepivacaine. It later dismissed those charges because the results of the independent laboratory did not confirm the presence of mepivacaine in Doo Dominate's urine sample.

¶18 Halsne said he looked at these documents before airing his report. He testified,

> We were looking for specific documents that support the allegations in front of us about Dr. Mitchell[,] about Doo Dominate. . . . [W]e couldn't read every word of those documents and didn't. We were looking for key pieces that would support our story and maybe shed some light on some areas that didn't support our story. . . .
>
> . . .
>
> [W]e had already done a couple of stories about Dr. Mitchell, and so when we went down we wanted to – I mean our concentration was on ties in [sic] Dr. Mitchell and the death of Doo

[4] The owner's license permitted Mitchell access to the track as a horse owner.

> Dominate and how close those ties were and what they were.

¶19 On February 4 and 5, 1998, KWTV repeatedly aired a promotional tape stating, "You'll be appalled by what racing officials say this vet has done." In the 10:00 p.m. newscast on February 5, 1998, the anchor introduced Halsne's story, stating,

> [A]n Oklahoma veterinarian is the target of a News Nine investigation tonight. Not only is he accused in a federal lawsuit of giving a world-class quarter horse painkillers before a show here, he's also suspected of killing one of the country's top racehorses. . . . Lead investigator, Chris Halsne has discovered that Dr. Mitchell has a troublesome past. . . .

¶20 Halsne then reported,

> [T]his incident isn't the first time Mitchell has been in trouble for his veterinary practices.
>
> Doo Dominate bolted out of Gate 9 during the 1994 All-American Futurity at Ruidoso Downs. One hundred yards from the finish, the powerful colt stumbled, broke both legs, and had to be euthanized. The New Mexico Racing Commission conducted an extensive investigation. An exam afterward showed Doo Dominate competed doped up and with a broken knee.

On March 26, 1998, the anchor introduced another story about Mitchell, stating, "A few months ago a News Nine investigation showed how Mitchell was connected to the doping of a world-class racehorse and a world champion show horse." Halsne then reported on the rescission of Mitchell's Oklahoma racing license.

¶21 This record presents sufficient evidence from which the jury could find Halsne falsely reported the NMSRC found Doo Dominate raced doped-up and Mitchell was linked to the doping. There is evidence Halsne knew the statement was false or acted with reckless disregard of whether it was false or not. A reasonable jury could find the statement injured Mitchell's professional reputation. The statement was not a true and fair report of the NMSRC proceeding and therefore is not privileged pursuant to 12 O.S.1991 § 1443.1(A).

¶22 Accordingly, we hold there was sufficient evidence for the jury to hold KWTV was liable to Mitchell for slander and false light invasion of privacy.

II

¶23 Another group of KWTV's contentions of error relate to the compensatory damages award. KWTV argues (1) the trial court erred in instructing on presumed damages, (2) Oklahoma law does not permit presumed damages in a defamation case against the media even when actual malice is shown, (3) presumed damages can only be nominal, (4) the compensatory damages awarded bear no rational relationship to the demonstrated harm and are so excessive as to shock the conscience, and, as noted in Part I above, (5) Mitchell put on no evidence any harm to his reputation was caused by false statements rather than true ones.

¶24 In *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the United States Supreme Court established the rule requiring proof of actual malice in order for public officials to recover for defamation. It later extended the rule to public figures in *Curtis*

Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court considered whether to apply the *New York Times* standard to private individuals. It declined to do so, reasoning states have a greater interest in protecting private individuals than public figures from defamation because private individuals have less access to communication channels to counteract false statements and therefore are more vulnerable to injury. *Id.,* 418 U.S. at 344, 94 S.Ct. at 3009. The Court stated,

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

However, the Court then balanced the media's First Amendment rights against the States' legitimate interest in compensating private individuals for injury to reputation:

> [T]his countervailing state interest extends no further than compensation for actual injury. . . . [W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

418 U.S. at 349, 94 S.Ct. at 3011.[5]

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[5] The Court further explained its holding:

> The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages

(Continued on following page)

without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. . . .

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. . . . Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. . . . In short, the private

(Continued on following page)

¶25 The Oklahoma Supreme Court addressed the application of *Gertz* to then-existing Oklahoma law in *Martin v. Griffin Television, Inc.,* 1976 OK 13, 549 P.2d 85. At that time, Oklahoma statutes allowed a presumption of malice from the publication of unprivileged, defamatory matter. The Court held those statutes were unconstitutional under *Gertz* because a presumption of malice allows liability without fault. It then chose negligence as the appropriate standard of liability for the publisher of a defamatory falsehood injurious to a private individual in Oklahoma.

¶26 The Oklahoma Supreme Court also overruled as unconstitutional a statutory section requiring a minimum judgment of one hundred dollars because the statute required no proof as to that minimum amount. It stated, "This is a presumed damage not allowed by *Gertz* without evidence and a finding of actual malice." *Id.* at 93.

¶27 KWTV argues the statute overruled in Martin was the only source of presumed damages in Oklahoma, and no cases following *Martin* have allowed presumed damages. As we discussed in Part I, 12 O.S.1991 § 1442 authorizes actions for slander *per se,* without a showing of actual damage, for false and unprivileged publications falling within the first four sections of the statute. Therefore, the Legislature contemplated presumed damages for slander *per se.* In light of *Gertz,* though, presumed damages are only allowed where actual malice is shown.

> defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.

418 U.S. at 349-350, 94 S.Ct. at 3011-3012.

¶28 However, the Legislature has set forth an exception to the allowance of presumed damages in 12 O.S.1991 § 1447.3 (emphasis added):

> In any action for damages for any defamatory statement published in or uttered as a part of a television and/or radio broadcast, the complaining party shall be allowed such actual and/or punitive damages *as he has alleged and proved.*

This statute is controlling in the instant case. Damages must be proved, not presumed. The trial court erred in instructing the jury (1) the law presumes Mitchell suffered general damages if he showed KWTV acted with malice, and (2) it may award presumed, general damages without proof of harm. Therefore, the trial court's judgment for compensatory damages is reversed and this matter must be remanded for new trial as to the issue of compensatory damages only.[6] On remand, Mitchell must prove his damages proximately resulted from the defamatory statements, but he is not limited to his out-of-pocket loss. He may recover for loss of profits as well as impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering, subject to proof. *Martin v. Griffin Television, Inc.,* 549 P.2d at 93.

¶29 Because we reverse the trial court's judgment as to compensatory damages, we need not reach KWTV's

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[6] A new trial may be granted on the issue of damages only in cases where it is clear the error in assessing damages did not affect the entire verdict. *Fields v. Volkswagen of America, Inc.,* 1976 OK 106, 555 P.2d 48, 53.

contentions that presumed damages can only be nominal and the verdict was excessive.

III

¶30 KWTV next contends the trial court erred as a matter of law in failing to determine certain statements were not actionable. It argues one group of statements were not actionable because they were not about Mitchell or were not defamatory. In its reply brief, KWTV argues the broadcasts should be viewed as a whole, with the statements considered in context. The gist of the broadcasts as a whole is that Mitchell doped horses to conceal their injuries. The statements in the context of the broadcasts are about Mitchell and are defamatory.

¶31 KWTV argues another group of statements were privileged pursuant to 12 O.S.1991 § 1443.1. As we discussed in Part I, KWTV's statements did not truly and fairly report legal proceedings. Therefore, its statements are not privileged.

¶32 KWTV argues two of the statements were protected opinion. These statements were that the death of one horse was connected to the doping of the other horse and that Mitchell was connected to the doping of both horses. The questions of whether the horses were doped and whether Mitchell was connected to their doping are sufficiently factual to be susceptible of being proved true or false. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21, 110 S.Ct. 2695, 2707, 111 L.Ed.2d 1 (1990). Therefore, the statements are not protected opinion.

IV

¶33 KWTV's next group of contentions relate to jury instructions. In reviewing jury instructions on appeal, we must consider the instructions as a whole. The instructions need not be ideal but must reflect Oklahoma law regarding the subject at issue. The test for error in instructions is whether the jurors were probably misled regarding the legal standards they should apply to the evidence. We will not reverse a judgment based on error in instructing the jury unless it clearly appears the instructions given or refused caused a miscarriage of justice. *King v. Neal,* 2001 OK CIV APP 11, 19 P.3d 899, 902.

¶34 KWTV first argues the trial court erred in refusing to pre-instruct the jury on the elements of Mitchell's claims and on the definition of actual malice, thus allowing the jury to be "infected with prejudicial evidence and argument." Even if pre-instruction would have been helpful, the jurors received the necessary instructions before they began deliberations. We find no error in the trial court's action.

¶35 KWTV next argues the trial court erred in refusing to give constitutionally adequate instructions because it refused to give an instruction regarding what is not actual malice. The jury instructions defining actual malice correctly state Oklahoma law. We are unable to conclude the jurors were probably misled regarding the legal standards they should apply to the evidence.

¶36 KWTV also argues the trial court inadequately defined negligence and direct cause. KWTV fails to support this contention with citations of authority. Accordingly, we will treat it as waived. *Messler v. Simmons Gun Specialties, Inc.,* 1984 OK 35, 687 P.2d 121, 129 n. 11.

¶37 We addressed the trial court's error in instructing on presumed damages in Part II above. KWTV's next contention is the trial court erred in refusing to give special interrogatories to the jury asking which statements it found to be actionable. The Oklahoma Constitution, Art 7, § 15, requires that all jury verdicts be general verdicts. The trial court has discretion to direct special findings. *Id.* We will not reverse a trial court under abuse of discretion unless it made a clearly erroneous conclusion and judgment, against reason and evidence. *Broadwater v. Courtney,* 1991 OK 39, 809 P.2d 1310, 1312. KWTV has failed to show any abuse of discretion in the trial court's refusal to give special interrogatories.

¶ 38 KWTV's last argument regarding jury instructions is the trial court erred in instructing on Category II punitive damages because Mitchell failed to show KWTV acted with malice. As we discussed in Part I, Mitchell put on evidence from which the jury could find malice. Therefore, the trial court properly instructed the jury on Category II punitive damages pursuant to 23 O.S.Supp.1995 § 9.1(C).[7]

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[7] 23 O.S.Supp.1995 § 9.1(C) provides,

Category II. Where the jury finds by clear and convincing evidence that:

1. The defendant has acted intentionally and with malice towards others; . . .

the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award exemplary damages in an amount not to exceed the greatest of:

a. Five Hundred Thousand Dollars ($500,000.00),

(Continued on following page)

¶39 The jury awarded punitive damages of $250,000.00 against each defendant. This award would be within the statutory limit set forth for Category II punitive damages regardless of the amount of compensatory damages awarded on remand. However, should the jury and trial court find no actual damages on remand, the punitive damages award must be vacated because § 9.1(C) requires an award of actual damages before punitive damages may be awarded. Accordingly, we do not reverse the award of punitive damages, but instruct the trial court to vacate the punitive damages award in the event there is no award of compensatory damages on remand.

V

¶40 KWTV's last group of contentions relate to evidentiary rulings. It asserts the trial court made three errors in admitting Mitchell's evidence, but fails to show how the admission of the evidence affected a substantial right. It argues the trial court improperly excluded testimony from two of its witnesses, but fails to show how that evidence would tend to make the existence of a material fact more or less probable. Therefore, we may not predicate any reversible error upon the trial court's evidentiary rulings. 12 O.S.1991 §§ 2104(A), 2401, and 2402.

¶41 For the foregoing reasons, the judgment of the trial court is AFFIRMED to the extent it found KWTV liable to

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b. twice the amount of actual damages awarded, or

c. the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff and other persons or entities.

Mitchell for slander and false light invasion of privacy and awarded punitive damages. It is REVERSED to the extent it awarded compensatory damages. This matter is REMANDED for new trial on the issue of compensatory damages only. The trial court is instructed to vacate the punitive damages award in the event there is no award of compensatory damages on remand.

¶42 The motion of The Reporters Committee for Freedom of the Press and others for leave to file an amicus curiae brief in this appeal was filed after the normal briefing cycle set for the party to be supported. Because the amici have failed to show the requisite extraordinary cause for leave to file their brief, their motion is denied.

¶43 AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

ADAMS, J. AND MITCHELL, J., CONCUR.

APPENDIX B

IN THE DISTRICT COURT OF CREEK COUNTY
STATE OF OKLAHOMA
BRISTOW DIVISION

H.L. MITCHELL, D.V.M., an individual,	)	
Plaintiff,	)	
vs.	)	Case No. CJ-99-16-B
GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation, and CHRIS HALSNE, an individual,	)	(Judge Joe Sam Vassar)
Defendants.	)	

JURY INSTRUCTIONS

* * *

INSTRUCTION NO. 9

In order for the Plaintiff to recover on his defamation claim, he must prove by a greater weight of the evidence each of the following things:

1. That the Defendants published a defamatory statement or statements about him;

2. That the statement was false and made the substance of the charge complained of by Plaintiff substantially false;

3. That the Defendants were negligent or acted in reckless disregard with respect to the truth of the statement that was broadcast; and

4. That the false and defamatory statement directly caused injury to his reputation.

The parties agree that Defendants published statements about the Plaintiff.

Unless the plaintiff proves all these things, your verdict must be for the Defendants.

Some of the terms I have used to describe the elements of the Plaintiff's claim have a specific meaning in the law, so I will define them for you.

* * *

INSTRUCTION NO. 20

If you find in favor of Plaintiff and that the Defendants (1) knew at the time of the broadcast that a defamatory statement about the Plaintiff was in fact false or (2) had at the time of the broadcast a high degree of awareness of the probable falsity or entertained serious doubts about the truth of the statements which you find to be false, then you may award him general damages. These are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include but are not limited to, reasonable compensation for loss of personal or professional reputation, shame, mortification, and hurt feelings. No definite method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages and no evidence of actual harm is required. In making an award for presumed damages you should exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable.

* * *

INSTRUCTION NO. 24

If you find that the Defendants defamed and/or caused Dr. Mitchell to be placed in false light, then you shall complete verdict form number 1.

If you find that Dr. Mitchell has failed to prove that the Defendants defamed him and failed to prove that Defendants placed him in a false light, then you shall complete verdict form number 2.

If you find in favor of Dr. Mitchell, and grant him actual damages, then you must also find whether the Defendants acted with reckless disregard for the truth as that term has been defined for you.

The Plaintiff has the burden of proving this by clear and convincing evidence.

If you find by clear and convincing evidence that either or both of the Defendants acted in reckless disregard for the truth, you may award punitive damages against such Defendant(s) in a later part of this trial. If you find that the Defendant(s) did not act in reckless disregard for the truth, you may not award punitive damages against the Defendant(s).

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Thursday, June 27, 2002

(Filed Jun. 27, 2002)

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * *

96,640 H. L. Mitchell v. Griffin Television, L.L.C. and Chris Halsne. **Corrected reply brief was accepted June 20, 2002. Brief in violation of length requirements filed May 20, 2002 is stricken and replaced by corrected brief.**

* * *

/s/ Rudolph Hargrave
CHIEF JUSTICE

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

H. L. MITCHELL, **Plaintiff/Appellee,** **v.** **GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation, and CHRIS HALSNE, an individual,** **Defendants/Appellants.**	**No. 96,640**

REPLY BRIEF OF APPELLANTS (CORRECTED)

Appeal from the District Court of Creek County
Honorable Joe Sam Vassar, CJ-99-16-B
Defamation

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ATTORNEYS FOR APPELLANTS

June 20, 2002

* * *

I. The plaintiff did not prove actual malice clearly and convincingly.

Proof of actual malice must be clear and convincing. *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964); *Herbert v. Oklahoma Christian Coalition, Inc.*, 1999 OK 90, ¶¶ 16, 18; 992 P.2d 322, 328. Whether the record is sufficient to show actual malice is a question of law. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989); *Herbert*, 1999 OK 90, ¶ 18, 992 P.2d at 328; *Gaylord Entertainment Co. v. Thompson*, 1998 OK 30, 958 P.2d 128. "[A]n appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *Herbert*, 1999 OK 90, ¶ 18, 992 P.2d at 328. *Accord: Harte-Hanks*, 491 U.S. at 688 ("[T]he reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect[.]'") (citations omitted). Mitchell did not, as a matter of law, prove actual malice clearly and convincingly.

* * *

KWTV's characterization of Mitchell's role in the death of Doo Dominate is a rational interpretation of ambiguous events, and reckless disregard of the truth cannot be inferred because the publisher proposes an interpretation of events different from that favored by the

plaintiff. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519 (1991) ("The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources."); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984) (no reckless disregard where report was but " 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer."); *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971) ("The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under *New York Times*."). *See also Henslee v. Monks*, 1977 OK 202, 571 P.2d 440 (in reporting accusations that police chief had possibly obstructed justice by agreeing with ranchers to allow them to hire illegal aliens, reporter's failure to understand legal distinctions between hiring and harboring aliens was not reckless disregard).

* * *

Supreme Court, U.S.
FILED
APR 16 2003
CLERK

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No. 02-1287

IN THE

Supreme Court of the United States

GRIFFIN TELEVISION OKC, L.L.C.,
and CHRIS HALSNE,

Petitioners,

v.

H. L. MITCHELL, D.V.M.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

REPLY BRIEF

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16 pp

STATEMENT PURSUANT TO RULE 29.6

The corporate disclosure statement for petitioner, Griffin Television OKC, L.L.C., was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Respondent's Brief in Opposition suffers the same analytical flaw as the decision of the Oklahoma Court of Civil Appeals which it tries to support—the principal arguments are grounded on only that evidence favorable to Respondent rather than the whole record.[1] Thus, even if Respondent has fairly recited the evidence the state appeals court said it relied on to affirm the jury's actual malice determination, the Brief in Opposition does not fairly present all the evidence in the record below that properly bears on, and must as a constitutional matter be considered in making, that determination.

As a result, Respondent's arguments miss the mark on issues critical to the petition for a writ of certiorari. The decision below is "final" with respect to federal constitutional issues for purposes of this Court's certiorari review. The Oklahoma appellate courts openly and unquestionably failed to perform their constitutional duty to conduct an independent review of the whole record. Contrary to the Court of Civil Appeals' analysis, that whole record, reviewed independently, does not support a clear and convincing finding of actual malice. As a result, this litigation would be terminated by the Court's decision on the merits. Certiorari should be granted because the decision below is an unconstitutional infringement of Petitioners' rights and is squarely contrary to this Court's clear pronouncements. *See, e.g., Duren v. Missouri*, 439 U.S. 357, 363

1. Respondent erroneously suggests that the appellate court's recitation of the facts should govern this Court's analysis because "the jury's underlying credibility assessments and factual determinations are still subject to a clearly-erroneous standard of review," Br. in Opp. 1 n.1. *See also* Br. in Opp. 22-23. Fed. R. Civ. P. 52(a) does not apply to state court actions. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). "No statute or rule governs [this Court's] review of facts found by state courts." *Hernandez v. New York*, 500 U.S. 352, 366 (1991) (reasons for deferential standard of review of state-court factual findings do not apply to the review of an actual malice determination). *See also New York Times Co. v. Sullivan*, 376 U.S. 254, 285 & n.26 (1964) (independent review by this Court of facts bearing on actual malice not limited by the Seventh Amendment). Any conclusion about what credibility determinations the jury in this case made is mere speculation. *Cf. Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 690 (1989) (sufficiency of actual malice evidence must be decided on "a less speculative ground" than what a jury *may* have found).

(1979) (certiorari granted where state-court judgment appeared inconsistent with Court's previous decision regarding constitutional rights).

1. The decision below is "final" within the meaning of 28 U.S.C. § 1257(a). This case falls within the fourth category of cases recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-487 (1975). To leave standing a constitutionally unsupportable finding of actual malice and the for-publication opinion of the Court of Civil Appeals that a jury's actual malice determination is to be reviewed deferentially – by examining only that evidence favorable to the prevailing plaintiff and ignoring all contrary evidence – clearly erodes the well-established requirement of the First Amendment that appellate courts, "as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose*, 466 U.S. at 511.[2] Although the Court of Civil Appeals contemplated further proceedings in state court, it is wholly uncertain that this Court will ever again have the chance to review the federal constitutional issues raised by this petition. Petitioners "might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issues by this Court," *Cox Broadcasting*, 420 U.S. at 482.

Respondent contends that the decision below is not final under *Cox Broadcasting* because reversal by this Court on federal constitutional issues will not preclude further litigation in the state court. Br. in Opp. 12-15.[3] Respondent is mistaken. The Court of Civil Appeals did not sustain Petitioners' liability

2. "Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Fort Wayne Books v. Indiana*, 489 U.S. 46, 55 (1989).

3. Respondent interprets the fourth exception in *Cox Broadcasting* to require "three distinct conditions." Br. in Opp. 11. *Cox Broadcasting* and the cases upon which it relies to define the fourth exception treat the first and second "conditions" as alternative rather than cumulative circumstances. *Cox Broadcasting*, 420 U.S. at 482-483. Thus, because Respondent apparently concedes the first circumstance, Br. in. Opp. 11, the fourth exception of *Cox Broadcasting* is met here because erosion of federal policy is clear. Nevertheless, this case meets even the three conditions.

for either Respondent's defamation or his false light claim on state-law grounds. This Court's determination on the merits that the record does not clearly and convincingly demonstrate actual malice would foreclose further litigation.

a. With respect to the false light claim, Respondent misreads *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714 (10th Cir. 2000), and *Colbert v. World Pub. Co.*, 1987 OK 116, 747 P.2d 286, to say that the actual malice element of a false light claim under Oklahoma law is merely a state-law standard as to which the Court of Civil Appeals' sufficiency-of-the-evidence finding is unreviewable by this Court. *Colbert* did not create some state-law fault standard modeled roughly on *New York Times* actual malice. In reliance on *Time, Inc. v. Hill*, 385 U.S. 374 (1967), and RESTATEMENT (SECOND) OF TORTS, § 652E, the court concluded that it was not free to select some lesser standard of fault than actual malice. *Colbert* described statements placing a plaintiff in a false light but not made with actual malice, as in *Hill*, as "statements falling within the constitutional guarantee of freedom of the press." *Colbert*, 747 P.2d at 290.[4] The decision of the Court of Civil Appeals here did not find sufficient evidence of actual malice as a matter of state law. It concluded – incorrectly, and without adequate review – that Respondent had proved *New York Times* actual malice. Clear and convincing proof of that level of fault was required to sustain a false light claim. Reversal of the jury's actual malice finding by this Court, after independent review of the whole record, would put an end to that claim.

b. With respect to his defamation claim, Respondent contends that negligence is a level of fault subsumed within the higher standard of actual malice; that the Court of Civil Appeals implicitly concluded (by affirming the finding of actual malice) that there was sufficient evidence of negligence to support liability; and that this Court's ruling on the actual malice question "would not affect Petitioners' liability on the defamation claim. . . . Whatever, this Court's holding, this case

4. *Zeran* does not hold that actual malice is a state-law standard. The argument advanced by the plaintiff and rejected by the court in that case, as in *Colbert*, was that actual malice was no longer constitutionally required in private-figure false light cases as a result of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

will return to the District Court for a new trial on the issue of compensatory damages." Br. in Opp. 14.

Respondent's analysis is fundamentally flawed.[5] While sufficient proof of actual malice might well suffice to prove negligence, it does not follow that evidence *inadequate* to establish a subjective reckless disregard of the truth is nevertheless adequate to establish, under an objective standard, the departure from professional standards necessary under Oklahoma law to sustain a private-figure defamation claim.[6] Theory aside, the Court of Civil Appeals did *not* hold that there was sufficient evidence of negligence, even in the circumscribed record it reviewed. To the contrary, the court said "[b]ecause Mitchell put on evidence of malice, he did not need to prove negligence." *Mitchell v. Griffin Television, L.L.C.*, 2002 OK CIV APP 115, ¶ 13, 60 P.3d 1058, 1063.

Respondent's defamation claim lacked proof of two essential elements: He failed to prove negligence, and he failed to present competent evidence of actual harm to reputation resulting from defamatory statements about him.[7] As a matter

---

5. Respondent necessarily concedes (Br. in Opp. 14 n.10) that the sufficiency of the evidence to establish fault, even negligence, is a matter of constitutional significance requiring independent review of the whole record. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990). The Court of Civil Appeals did no more independent review of the record for evidence of negligence than it did for evidence of actual malice.

6. Respondent incorrectly suggests (Br. in Opp. 14 n.10) that expert testimony is not required under Oklahoma law. In *Malson v. Palmer Broadcasting Group*, 1997 OK 42, 936 P.2d 940, expert testimony was presented. No private-figure defamation case in Oklahoma has affirmed a finding of liability without expert testimony. If there is expert evidence that the broadcaster acted in compliance with professional standards, a plaintiff cannot recover for defamation without expert testimony to the contrary, *see, e.g., Wiley v. Ohio/Oklahoma Hearst-Argyle Television, Inc.*, 33 Fed. Appx. 434, 2002 WL 511746 (10th Cir. 2002) (unpublished) (summary judgment affirmed where plaintiff did not adduce expert evidence of professional negligence).

7. Actual injury to reputation as a direct result of false statements about Respondent in the broadcasts (as opposed to other causes, such as the New Mexico and Oklahoma disciplinary proceedings against him) "is the essence of an action for defamation." *Zeran*, 203 F.3d at 719 ("Plaintiff's defamation claim fails because Plaintiff has not shown that

(Cont'd)

of trial strategy, clearly revealed in the record below, Respondent attempted to leap the evidentiary gaps in his defamation claim by trying to prove actual malice – thereby avoiding the need to prove professional negligence and, he assumed incorrectly with respect to presumed damages, the need to prove actual harm to reputation. However, having failed to prove negligence and actual harm to reputation, and (when the whole record is reviewed independently) having failed clearly and convincingly to prove actual malice, his defamation claim is subject to dismissal, not retrial. Respondent's proof at trial failed. Reversal by this Court on the merits of the actual malice issue should result in a judgment for Petitioners.

2. The Court of Civil Appeals applied an unconstitutional standard of review. Respondent's effort to excuse the Court of Civil Appeals' truncated review of the record ignores the critical issue that independent review is not measured by the physical extent to which the court looks at the evidence but by its intellectual attitude toward that evidence. That is, the Court of Civil Appeals said unabashedly that it would "determine the sufficiency of the evidence to sustain a judgment in light of the evidence tending to support it, together with every reasonable inference deducible therefrom, rejecting all evidence adduced by the adverse party which conflicts with it." *Mitchell*, 2002 OK CIV APP 115, ¶ 8, 60 P.3d at 1062. Thus, even had the court looked at the entire record, its review was not *de novo* but avowedly deferential because it ignored all evidence contrary to the verdict. This Court has rejected arguments that "appellate courts professing adherence to the rule of deference actually are reviewing

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any person thinks less of him . . as a result of the broadcast."). *Accord*: *Hussain v. Palmer Communications Inc.*, __ Fed. Appx. __, 2003 WL 1558286, *4 (10th Cir. 2003) (unpublished) (same). Respondent concedes (Br. in Opp. 8 n.8) that his proof of actual injury was evidence of emotional distress and business losses, not harm to reputation. However, under *Zeran*, proof of emotional distress alone is not sufficient to sustain a defamation claim; and Respondent's trial evidence of business losses were those sustained by his hospital corporation, which had been dismissed as a party before trial.

de novo." *Salve Regina College v. Russell*, 499 U.S. 225, 235 (1991). Courts that profess deference are, in fact, deferring. The Court of Civil Appeals' stated standard of deferential review contravenes the constitutional *de novo* review requirement of *Bose*, and leaves to this Court the duty "to test challenged judgments against the guarantees of the First and Fourteenth Amendments." *Bose*, 466 U.S. at 508 n.27 (internal quotes and citations omitted).

3. The evidence in the whole record, reviewed independently, does not clearly and convincingly prove actual malice. Like the Court of Civil Appeals, Respondent finds evidence of actual malice in a perceived variance between the language of KWTV's news reports and individual documents (the federal court complaint and the NMHRC order) that Petitioners obtained prior to the broadcasts. The evidence in the whole record demonstrates those documents to be anything but "unambiguous." In particular, the NMHRC order left many open questions—answered to Halsne's satisfaction by Conwell, the official spokesman for the agency—about Petitioner's alleged involvement in the death of Doo Dominate. Regardless of the degree of ambiguity hindsight might reveal, as a constitutional proposition, the perceived disparity between a document and its interpretation in the broadcasts is not evidence of actual malice. *Bose*, 466 U.S. at 512-513. Even assuming the jury agreed with the interpretation of the documents favored by Respondent and the Court of Civil Appeals, that conclusion would bear on the issue of falsity, not constitutional fault. In *Harte-Hanks*, 491 U.S. at 681, this Court rejected the proposition offered by Respondent here: "Difference of opinion as to the truth of a matter—even a difference of 12 to 1—does not alone constitute clear and convincing evidence [of actual malice]." Rather, there must be clear and convincing extrinsic evidence that prior to the broadcasts, Petitioners in fact had knowledge or entertained a high degree of awareness of probable falsity. *Id.* (citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). If there was a difference between what the documents said and what Petitioners reported, the Court of Civil Appeals did not refer to any evidence, nor does Respondent invite this Court's attention to any, that Petitioners *perceived* a difference

and knowingly reported as fact something they believed was probably not true. Viewed properly and independently, the record in fact shows they did not perceive such a difference, precisely because of evidence explicitly ignored by the Court of Civil Appeals – evidence from Conwell, the drafting lawyer, and others explaining what was behind the language of the order and the complaint.

Respondent accuses Halsne of engaging in a "flagrant falsehood" at trial, Br. in Opp. 25, from which the jury could reasonably infer actual malice. He suggests that the entire investigation conducted by Halsne consisted of a 12- or 13-minute interview with Conwell and a cursory review of documents from the NMHRC file. To the contrary, the on-camera interview of Conwell was only part of Petitioners' communications with New Mexico officials. As Halsne and Special Projects Producer Kim Albro testified, they received documents and talked extensively by telephone with the NMHRC before and after Halsne's trip to Albuquerque; while in Albuquerque, Halsne talked to Julian Luna (the Executive Director of the NMHRC), Conwell, and other NMHRC staff off-camera; and while reviewing documents for several hours, Halsne and his photographer were guided by the NMHRC staff (Tr. at 433-34, 441-43, 448-79, 482-83, 535-38, 540-41, 551-53, 565, 611-12, 651, 676, 679, 1233, 1258, 1261). Though Halsne and Conwell had differing recollections whether Conwell was physically present while Halsne reviewed NMHRC documents, it is undisputed that by the time KWTV's February 5, 1998 news report aired, Halsne had information which supported the key elements of what was said in the report: Mitchell worked illegally on Doo Dominate; the horse had a slab fracture of the knee that made it unfit to race; the horse nevertheless ran, broke down, and had to be euthanized; post-race testing confirmed the slab fracture and the presence of mepivicaine, an illegal painkiller; the matter had been extensively investigated; Mitchell had been banned for life from New Mexico racetracks; and he was suspected of helping kill Doo Dominate. Halsne and Conwell had already talked before the February 5 broadcast about the meaning of the drug tests, why the owner and trainer had not been prosecuted,

and why the NMHRC Decision and Order against Mitchell did not address the reasons for the breakdown of Doo Dominate. At trial, Conwell testified that KWTV's reports about Mitchell's role in the events in New Mexico were accurate and accurately reflected what Conwell, as the official spokesperson for the NMHRC, told Halsne. Halsne did not fabricate an investigation.[8]

4. Petitioners' rational interpretation of ambiguous public documents precludes a finding of actual malice. Petitioners' reporting relied, in part, on public documents, but their interpretation of those documents was shaped by information from other sources. Independent review of the record as a whole, which demonstrates Petitioners' rational and other-source-based interpretation of the public documents, precludes a finding of actual malice. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519 (1991); *Bose*, 466 U.S. at 512-513; *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971).[9]

Respondent's ineffective effort to distinguish *Time, Inc. v. Pape* is grounded on the unsupportable premise that the some of the documents Halsne examined were "unambiguous primary sources" and that an official spokesman for the public agency issuing the document is merely a "secondary source"

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8. Respondent also suggests that the broadcast of more reports about him after his counsel wrote letters to KWTV is further evidence of actual malice. Br. in Opp. 26 n.16. It is not. *See, e.g., Harte-Hanks*, 491 U.S. at 691 n.37; *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243, 252 (1st Cir. 2000); *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 427 (Tex. 2000); *Hart v. Blalock*, 1997 OK 8, ¶¶ 4-8, 932 P.2d 1124, 1126. Moreover, Respondent's counsel directed Halsne not to contact him. A plaintiff cannot claim actual malice if he has declined to discuss his position with the reporter. *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662 (9th Cir. 1990); *Hodge v. WCPO Television News*, 29 Med.L.Rptr. 2597 (Ky.Cir.Ct. 2001).

9. Petitioners preserved this issue for appeal by moving in the trial court for a directed verdict (Tr. 1184-1204, 1523-24) on the ground, among others, that the evidence did not clearly and convincingly demonstrate actual malice. Petitioners raised the "rational interpretation" issue in their appellate briefs below. (The only text in Petitioners' Appendix at 68a-70a that was not included in the corrected reply brief submitted to the Court of Civil Appeals, *see* Br. in Opp. 27 n.17, was a reference in a footnote to a New Jersey case.) Neither the Court of Civil Appeals nor the Oklahoma Supreme Court held that Petitioners waived the issue in this case.

whose explanation of underlying events related to the document may, if not must, be ignored in a constitutional determination of actual malice.[10] Respondent's argument is squarely contrary to the constitutional requirement that all the facts in the whole record bearing on the actual determination be considered. The contention that Petitioners' state of mind about the information broadcast can be divined by contrasting what was reported with the federal court complaint and the NMHRC notice of proposed action and final order, to the exclusion of other evidence, flies in the face of every decision by this Court defining what is and what is not actual malice. As this Court said in *Pape*, 401 U.S. at 290 (emphasis added), "[t]o permit the malice issue to go to the jury . . . despite . . . *the external evidence of the Report's overall meaning*, would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact."

Whether it be interviews of This Lady Sings' trainer and the legal counsel for the buyer who brought suit, who shed light on the facts and circumstances leading to the buyer's fraud and rescission claims against the seller reflected by the

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10. Conwell did not "create an illusion of ambiguity [about the NMHRC order] where none exists." Br. in Opp. 29. The order did not clear Mitchell of involvement in Doo Dominate's death. While the order said the "evidence presented at the hearing" did not support the charge that Mitchell aided Doo Dominate's owner and trainer in running an unfit horse, the order, which recited in detail the evidence that was presented at the hearing, showed on its face that the State had elected to present no evidence on that charge at all. As Conwell explained to Halsne, Mitchell's absence from the hearing eliminated the need to present all the evidence developed in the investigation about Mitchell's role in the death of Doo Dominate, because his track license could be revoked on the sole ground he practiced veterinary medicine illegally. As the order itself demonstrates, evidence of illegal veterinary practice was the only "evidence presented at the hearing." That a State drops charges against an accused does not mean that a publisher cannot report, and the reporter not believe he is accurately reporting, that evidence to support the charge had been developed in an investigation. *Cf. Cobb v. Time, Inc.*, 278 F.3d 629 (6th Cir. 2002) (applying correct standard and reversing jury verdict of actual malice, finding that, in *Sports Illustrated* report that plaintiff was involved in a fixed boxing match, reporters relied on information from executive director of state athletic commission that he believed the fight was fixed, even though commission did not sanction boxer).

lawyer's choice of words in the federal court complaint; or whether it be interviews of Conwell and other NMHRC staff, and other documents in the NMHRC file, which fleshed out the facts and circumstances revealed in the investigation into the death of Doo Dominate, the undeniable fact remains that the whole record shows that Petitioners had sources that they believed credible to support what was broadcast. Petitioners' state of mind – whether they "acted with a knowledge of falsity or with a 'high degree of awareness of . . . probable falsity,'" *Harte-Hanks*, 491 U.S. at 681 (internal citation omitted) – cannot be measured, as the Court of Civil Appeals did and as Respondent proposes this Court do, by reference to isolated public documents, where the record as a whole reveals other sources (especially an official spokesperson) that support the statements that were broadcast. The evidence in the record as a whole does not clearly and convincingly demonstrate actual malice.

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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